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ALEXANDER L. STEVAS,
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No. 80-702

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Petitioner

v.

STATE OF NEW MEXICO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

PETITION FOR CERTIORARI FILED OCTOBER 30, 1980
CERTIORARI GRANTED FEBRUARY 23, 1981.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 75-418

UNITED STATES OF AMERICA, PLAINTIFFS

v.

STATE OF NEW MEXICO; BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; and O'CHESKEY, Presiding as Commissioner of Revenue of and for the State of New Mexico and his successors in office, DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
7-17-75	1	Complaint with attachments.
		Summons, original and three copies issued and with complaint attached thereto delivered to the Marshal for service.
	7	ANSWER by defts containing affirmative defenses.
1-5-76	9	MOTION by defts to dismiss complaint for absence of a case or controversy and of issues ripe for adjudication.
	10	MEMORANDUM in support of defts' motion to dismiss the complaint herein.
	11	AFFIDAVIT by Fred L. O'Cheskey.
1-29-76	12	OPPOSITION by pltf to defts' motion to dismiss complaint and opposition to defts' other procedural defenses raised in their answer.
	13	MEMORANDUM OF POINTS AND AUTHORITIES by pltf in support of their opposition to defts' motion to dismiss and other procedural defenses raised in their answer.

DATE	NR.	PROCEEDINGS
	14	REQUEST FOR ADMISSIONS by pltf.
	15	INTERROGATORIES by pltf to deft.
2-27-76	16	REPLIES TO INTERROGATORIES by defts.
	17	RESPONSE by defts to request for admissions.
3-29-76	18	MOTION by pltf for summary judgment.
	19	MEMORANDUM of points and authorities by pltf in support of motion for summary judgment with exhibits attached.
4-8-76	20	MOTION by defts to dismiss complaint for absence of standing on the part of pltf to bring this action.
	21	MEMORANDUM in support of deft's motion to dismiss for lack of standing.
6-11-76	25	ORDER that the motion of the defts to dismiss is denied. (MECHEM) Copies mailed to counsel.
7-6-76		SUPPLEMENTAL EXHIBITS by pltfs in support of its motion for summary judgment.
7-28-76	26	INTERROGATORIES by defts.
8-30-76	27	AFFIDAVIT of John F. McNett.
	28	ANSWERS TO INTERROGATORIES by pltf.
10-15-76	29	Pl's SUPPLEMENTAL ANSWERS to Defts' Interrogatories (First Set)
11-8-76		Set for PTC 11-17-76 at 9:00 A.M. at Albuq. Counsel notified.
11-17-76		Judge Mechem holds pretrial conference.
2-7-77	30	PLAINTIFF'S SUPPLEMENTAL ANSWERS to Defendants' Interrogatories. (Second Set) with Exhibits in Two Volumes.
3-25-77	31	SECOND SET OF SUPPLEMENTAL DOCUMENTS by pltf in support of its motion for summary judgment, with exhibits attached.

DATE	NR.	PROCEEDINGS
4-27-77	32	NOTICE TO TAKE DEPOSITION of Mr. Daniel McGrath by defts.
	33	REQUEST by defts to produce and permit inspection and copying documents.
6-22-77	34	REQUEST FOR PRODUCTION by defts.
6-22-77	35	SUPPLEMENTAL ANSWERS TO INTERROGATORIES by pltf.
7-12-77		Set for trial at Albuq. 8-1-77 at 9:00 A.M. Counsel notified.
7-22-77	36	RESPONSE by pltf to request for production.
	37	ANSWERS TO ADDITIONAL INTERROGATORIES 122, 123, & 124 by pltfs.
7-28-77	38	THIRD SET OF SUPPLEMENTAL DOCUMENTS by pltf in support of its motion for summary judgment.
8-3-77	39	REQUEST FOR PRODUCTION by defts.
8-10-77		DEPOSITION of Anthony G. Carretta and Daniel H. McGrath, Jr.
8-31-77	41	MOTION by defts to compel discovery,
	42	MEMORANDUM in support of motion to compel discovery.
9-1-77	43	CERTIFICATE by Daniel H. Friedman of compliance with local rule 10(c).
9-7-77	44	MEMORANDUM by pltf in opposition to defts' motion to compel discovery.
9-9-77	45	STIPULATION by parties as to certain facts.
9-15-77	46	AFFIDAVIT of John F. McNett.
3-22-77	47	STIPULATION by parties as to certain answers to interrogatories.

DATE	NR.	PROCEEDINGS
9-26-77	48	DEFT'S CROSS MOTION FOR SUMMARY JUDGMENT W/SUPPORTING MEMORANDUM AFFIDAVITS AND EXHIBITS.
10-6-77	50	OPPOSITION by pltf to defts' cross motion for summary judgment with exhibits attached.
10-17-77	51	MOTION by defts to exclude evidence.
	52	MEMORANDUM by defts in support of its motion to exclude evidence.
10-27-77	53	RESPONSE by pltf to motion to exclude evidence.
10-31-77	54	AFFIDAVIT of Daniel H. McGrath, Jr..
8-4-78	55	ORDER that the deft's motion to exclude evidence is denied. (MECHEM) Copies to counsel.
	56	MEMORANDUM OPINION. (MECHEM) Copies to counsel.
	57	DECLARATORY JUDGMENT THAT sales of tangible personal property to the Environmental Research and Development Administration are sales to the US through its procurement agents which are not subject to the 4% gross receipts tax nor to the compensating tax imposed by the NM Gross Receipts and Compensating Tax Act. (MECHEM) Copies to counsel.
		FINAL ENTRY
8-14-78		Memorandum Opinion mailed for publication.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 78-1755

GENERAL DOCKET

DATE	PROCEEDINGS
—/18/78	Cause docketed, docketing statement, orig. & 9 cc, c/s.
—/30/79	HRG. SET Hearing set for October, 1979, Special Session—Denver, Colorado
10/16/79	CS.ARG.SUBM.—case argued and submitted to McWilliams, Barrett, McKay
6/2/80	OPN.F. Published, signed opinion filed—McWilliams, Barrett, McKay Writing Judge is McKay JM.DISP. Judgment affirmed in part, reversed in part. The cause is remanded.
6/10/80	OPN.RMK. Ordered page 10, line 5 of footnote 6—change the word "takes" to "taxes"—McWilliams, Barrett, McKay
6/24/80	MDT.ISS—mandate issued to district court
11/3/80	P.WRIT.CERT.F Appellant's filing of petition for writ of certiorari on October 30, 1980, Supreme Court #80-702.
2/26/81	P.WRIT.CERT.DISP. Appellant's petition for writ of cert granted by Supreme Court order filed 2/23/81.

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW MEXICO

Civil Action No. 75-418

Complaint (R.I-1)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF NEW MEXICO;
BUREAU OF REVENUE OF THE STATE OF NEW MEXICO;
and FRED L. O'CHESKEY, as Commissioner of
Revenue of and for the State of New Mexico,
and his successors in office, DEFENDANTS

COMPLAINT

Comes now the plaintiff, United States of America, by its attorney, Victor R. Ortega, United States Attorney for the District of New Mexico, and complains and alleges as follows:

1. This is a civil action instituted by the United States of America for the purpose of obtaining from this Court a declaratory judgment ordering and adjudging that the Constitution and the laws of the United States and the laws of the State of New Mexico prohibit the imposition or application of certain provisions of the New Mexico Gross Receipts and Compensating Tax Act (Sections 72-16A-1 through 72-16A-19, N.M.S.A., 1953, as amended, effective July 1, 1967 hereinafter sometimes referred to as the "Tax Act") against certain activities performed by the United States through its federal contractors. Erroneous application of the Tax Act to said activities could illegally subject the plaintiff, United States of America, to liabilities exceeding ten million dollars ($10,000,000) per year.

2. This action has been authorized and requested by a delegate of the Energy Research and Development Administration (hereinafter referred to as "ERDA"), an independent agency of the United States of America established under the provisions of Public Law 93-438, and is brought under the direction of the Atorney General of the United States, to protect the pecuniary interests and sovereign rights of the United States.

3. Jurisdiction of this action is conferred upon this Court by the provisions of Sections 1345 and 2201 of Title 28, United States Code, for the reason that this is a civil action brought by the United States to obtain a declaratory judgment from this Court respecting the interests of the United States.

4. An actual controversy, as is more fully described below, has arisen and now exists between the United States of America and the defendants concerning their respective rights and duties and plaintiff is suffering actual and threatened harm by virtue of actions of the defendants.

5. Plaintiff, United States of America, is a corporate sovereign and body politic.

6. (A) The defendant, State of New Mexico, is a body politic and corporate sovereign and is joined as a defendant in this action because the action involves the interpretation of a State law and its application. (B) The defendant, Bureau of Revenue of the State of New Mexico, is the State agency responsible for the administration and enforcement of the New Mexico tax laws, including the New Mexico Gross Receipts and Compensating Tax Act. (C) Defendant, Fred L. O'Cheskey is the Commissioner of Revenue of and for the State of New Mexico and is joined herein in his official capacity.

7. In the performance of its governmental functions, plaintiff, United States of America, and more specifically, ERDA, has entered into, prior to and since enactment of the Tax Act, and will enter into contracts with, and

has employed, contractors to perform activities to further its governmental functions.

8. The United States owns the Los Alamos Scientific Laboratory at Los Alamos, New Mexico which is devoted exclusively to the conduct of research and development for the United States Government.

9. The Zia Company (hereinafter referred to as "Zia"), a corporation organized and existing under the laws of Delaware, has since April 1, 1946 been performing work for the United States as an operating contractor in support of Governmental operations at the Los Alamos Scientific Laboratory under an operating contract with ERDA. Zia performs management, operational, maintenance, architect-engineering, procurement and other related support activities for the United States at Los Alamos and is paid a fixed-fee negotiated annually. Zia pays New Mexico gross receipts taxes imposed by the Tax Act based on the amount of its fixed-fee.

10. Los Alamos Constructors Inc. (hereinafter referred to as "LACI"), a corporation organized and existing under the laws of New Mexico, has since March 31, 1953, been performing work for the United States as an operating contractor in support of Governmental operations at the Los Alamos Scientific Laboratory under an operating contract with ERDA. LACI performs construction, alteration, and repair work, and other related support activities for the United States at Los Alamos and is paid a fixed-fee negotiated annually. LACI pays New Mexico gross receipts taxes imposed by the Tax Act based on the amount of its fixed-fee.

11. Sandia Corporation (hereinafter referred to as "Sandia"), a corporation organized and existing under the laws of the State of Delaware has, since 1949, operated Sandia Laboratories, which are Government-owned facilities devoted exclusively to the conduct of research and development for the United States. The principal facilities of Sandia Laboratories are located in Albuquerque, New Mexico. Sandia is a subsidiary of Western Electric

Company (hereinafter referred to as "Western") a corporation organized and existing under the laws of the State of New York. Sandia was created for the sole purpose of operating the Government-owned Sandia Laboratories and performing research and development for the United States under an operating contract between ERDA and Western. Neither Sandia nor Western receives any fee or profit in any form for its activities under the operating contract.

12. It is provided, pursuant to ERDA operating contracts with Zia, LACI and Western, that the United States is obligated to pay directly from Government funds the costs of conducting Government activities, including legal taxes, and that pursuant to each of these ERDA operating contracts, ERDA establishes and maintains United States Government advanced funding, hereinafter described in more detail, through which payments are made for all purchases, expenditures, and costs incurred thereunder, resulting in the expenditure only of United States funds for the purchase of tangible personal property, services and other expenses under these ERDA operating contracts.

13. In order to facilitate Government operations, United States Government advanced funding is established and maintained for each ERDA operating contract by creating a United States Government account which is identified as a special account of the United States Energy Research and Development Administration. Under the ERDA contract, title and ownership of the special United States Government account and balance therein, if any, remains in the Government, and the ERDA operating contractor at no time acquires any right, title or interest in such United States Government account, other than the obligation to make Government expenditures therefrom as provided in the ERDA contract.

14. It is provided under the ERDA operating contracts, that title and ownership of all tangible personal property acquired for use under all operating contracts pass di-

rectly from the vendor to the Government and remain at all times in the Government and never at any time vest in any ERDA operating contractor.

15. In response to ERDA's letter of January 30, 1975 (attached hereto as "Exhibit 1"), the New Mexico Commissioner of Revenue as evidenced by his letter of February 28, 1975 to ERDA (attached hereto as "Exhibit 2"), has (a) refused to provide appropriate nontaxable transaction certificates to Zia and LACI and (b) has insisted that ERDA's operating contractors continue to maintain burdensome and costly record-keeping activities which would not be necessary if nontaxable transaction certificates were issued, and by doing so has harmed the plaintiff, United States of America. The Commissioner also threatens to assess gross receipts taxes against vendors from which ERDA procures its tangible personal property, through its operating contractors, under transactions in which title and ownership of the property pass directly from the vendors to the Government and payment to the vendors is made directly from special United States Government advanced fund accounts described in Paragraph 12 above, contrary to the provisions of the Constitution and laws of the United States and the Tax Act.

16. The New Mexico Bureau of Revenue and Commissioner of Revenue have assessed and now threaten to assess ERDA operating contractors, including Zia, LACI and Sandia gross receipts taxes on the basis of Government-owned advanced fund accounts maintained as described in Paragraph 12 above, contrary to the provisions of the Constitution and laws of the United States, and the Tax Act.

17. The New Mexico Bureau of Revenue and Commissioner of Revenue, have assessed and now threaten to assess compensating (use) taxes against ERDA contractors based on the use of Government-owned tangible personal property purchased pursuant to ERDA contracts with advanced funds as described above, contrary to the

provisions of the Constitution and laws of the United States and the Tax Act.

18. By refusing to issue nontaxable transaction certificates to United States ERDA operating contractors, by imposing a costly record-keeping burden on United States ERDA operating contractors, by refusing to recognize the principles of law as declared in the concurring opinion in the case of *United States, Zia and LACI* v. *Bureau of Revenue, State of New Mexico*, New Mexico Court of Appeals, No. 1217, January 8, 1975 (N.M.St.Bar Vul.V.13 #42 1975, pp. 558-562), and by threatening to assess such contractors for gross receipts taxes measured by United States Government advanced funds and assess compensating (use) taxes on property owned by the United States Government, the New Mexico Bureau of Revenue and Commissioner of Revenue have violated the Constitution and laws of the United States and the Tax Act.

19. The New Mexico Bureau of Revenue and Commissioner of Revenue, have denied and threaten to deny to the United States its right, as a matter of law, under the Constitution and laws of the United States and under the laws of the State of New Mexico to intervene in proceedings before the Bureau wherein the taxes in dispute must be or are paid by the United States pursuant to its contractual obligations.

20. Under terms of contracts between ERDA and its operating contractors, the United States Government is obligated to bear the burden of any taxes paid by Zia, LACI, or Sandia.

WHEREFORE, plaintiff, United States of America, prays that this Court enter an Order granting a declaratory judgment, ordering and adjudging, in light of the Constitution and laws of the United States and the laws of the State of New Mexico, including the Tax Act, that:

1. United States Government advanced funds are not taxable gross receipts to operating contractors of the

United States Energy Research and Development Administration;

2. the receipts of vendors from the sale of tangible personal property to the United States Energy Research and Development Administration, acting through its operating contractors, wherein title and ownership of such tangible personal property pass directly from the vendor to the United States Government and payment is made from United States Government advanced funds, are not taxable gross receipts;

3. United States Government-owned tangible personal property purchased by the United States Energy Research and Development Administration, through its operating contractors, with United States Government advanced funds is not subject to compensating (use) taxes;

4. the United States is entitled, as a matter of law, to intervene in administrative tax proceedings before the New Mexico Commissioner of Revenue wherein the taxes in dispute are paid or must be paid by the United States pursuant to its contractual obligations; and

6. such other and further relief as may be just and proper.

VICTOR R. ORTEGA
United States Attorney

By: _____

Of Counsel:

JOHN J. MCCARTHY, Chief
General Litigation Section
Tax Division

/s/ Charles E. Stratton
CHARLES E. STRATTON
Trial Attorney—Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-3056

"EXHIBIT 1"

Jan. 30, 1975

Honorable Fred L. O'Cheskey
Commissioner of Revenue
State of New Mexico
Santa Fe, New Mexico 87501

Dear Mr. O'Cheskey:

In December of 1969 the Atomic Energy Commission entered into a written agreement (Contract AT(29-2)-2849) with Commissioner Franklin Jones for the issuance of special temporary nontaxable transaction certificates for use by our New Mexico operating contractors in purchasing tangible personal property for the Atomic Energy Commission. Since that date we have maintained records, as required by our agreement, to account for the taxes which would have been collected on those transactions.

With your concurrence we propose now to advise our contractors that the keeping of these records of contingent tax liabilities for current and past periods is no longer necessary in light of the January 8, 1975, decision of the New Mexico Court of Appeals in *United States of America, The Zia Company, and Los Alamos Constructors, Inc.* v. *Bureau of Revenue*, No. 1217. As you know, that decision holds that our operating contractor, The Zia Company, was not subject to compensating tax on its purchases of tangible personal property for the Atomic Energy Commission in accordance with rulings issued by your predecessors which, as specifically noted by the concurring opinion of Judge B. C. Hernandez, were correct interpretations of the applicable New Mexico and federal law.

We would also request that you now issue standard type 9 nontaxable transaction certificates for use by those contractors previously authorized to use special certificates

under the AEC-Bureau of Revenue agreement. These contractors are: The Zia Company, Sandia Corporation, Lovelace Foundation, and EG&G (Nevada Operations activity). The University of California, though originally covered by the agreement, is now using separate NTTC's as a 501(c)(3) organization pursuant to your authorization of May 18, 1973. We would be happy to provide you with current contract provisions, purchase orders, bank account agreements, or any other documentation you need to assure yourself that the other contractors fall within the scope of the *Zia* decision.

We believe that the issuance of permanent certificates at this time is in accordance with ruling 69-001-18, dated December 18, 1969. That ruling, signed by Commissioner Jones and Deputy Attorney General O'Dowd, provided:

> "If a court of competent jurisdiction issues a final decision, not subject to review, which holds that the taxes imposed by the New Mexico Gross Receipts and Compensating Tax Act, Sections 72-16A-1 et seq., N.M.S.A. 1953 Comp., do not apply to some or all of the transactions for which the buyers have executed Special Certificates the Bureau may withdraw the Special Certificates, in whole or in part, and may issue such standard nontaxable transaction certificates in their place as may be indicated by the court's decision. No gross receipts or compensating tax liability shall be imposed as a result of such withdrawal for any past or future transactions which are the subject matter of the court's decision."

The period of uncertainty concerning the tax status of our operating contractors in New Mexico has been of much longer duration that we anticipated in 1969. Each year since 1969 we have faced higher costs and tighter budgets for our operations in New Mexico. Under these circumstances we must take special care to eliminate wherever possible unnecessary administrative burdens. This objec-

tive is especially important today when we are in a critical period of transition from the Atomic Energy Commission to the Energy Research and Development Administration. Accounting for contingent tax liabilities is a particularly burdensome process which would now appear to be unnecessary. I would, therefore, appreciate hearing from you at an early date with regard to these matters.

If there is any way in which my staff or personnel of our operating contractors can be of assistance in bringing this matter to a conclusion, please do not hesitate to call upon us. In view of the importance of this matter to the new Energy Research and Development Administration, I would appreciate your directing your correspondence to me.

Sincerely,

/s/ H. C. Donnelly
H. C. DONNELLY
Manager

OGG:JFM

bcc: Charles E. Stratton, Esq.
General Litigation Section
Tax Division
U.S. Department of Justice
3313 Old Star Bldg.
Washington, D.C. 20530

Sally M. Gerety, Counsel, LAAO

"EXHIBIT 2"

[SEAL]

An Equal Opportunity Employer

STATE OF NEW MEXICO
BUREAU OF REVENUE
Santa Fe, New Mexico
87801

TO: John Cho, Asst. Counsel, H
ATTN: Brian Kildee, Attorney
Phone for pickup 4565

Feb. 28, 1975

Mr. H. C. Donnelly
Manager
U.S. Energy Research & Development
Administration
Albuquerque Operations Office
P.O. Box 5400
Albuquerque, New Mexico 87115

Dear Mr. Donnelly:

Your letter asks for my concurrence to your informing your contractors that records of contingent tax liabilities are no longer necessary.

The Court of Appeals' decision did not reach the substantive issue of tax liability of companies such as Zia. The only question decided by the majority was the matter of estoppel under the now repealed Emergency School Tax and Compensating Tax Act. Moreover, Judge Hernandez' opinion is not the law of the case.

Since the important issues raised are unresolved, it would be premature to advise these contractors who are addressees of Ruling 60-001-18 to abandon their record

keeping obligations. Nor does the Bureau propose to issue Type 9 Certificates at this time.

Previous agreements have prevented collection of great amounts of revenue by this state. This burden is certainly as great as the burden of record keeping on your contractors. Because the Court's opinion does not reach the ultimate issues, the Bureau is not prepared to concede these issues and we will have to present another case to the Court. Therefore, all parties now bound by the ruling must continue to bear their respective burdens until the courts finally address the important questions involved.

Very truly yours,

/s/ Fred L. O'Cheskey
FRED L. O'CHESKEY
Commissioner of Revenue

FLO'C/VOH/ca

EXCERPTS FROM ATOMIC ENERGY COMMISSION CONTRACT W-17-028-ENG-90 DATED JULY 1, 1970, WITH THE ZIA COMPANY (R. II)

• • • • •

ARTICLE VI—ALLOWABLE COSTS AND FIXED FEE

1. *Compensation for Contractor's Services.* Payment for the allowable cost as hereinafter defined, and of the fixed fee, if any, as hereinafter provided, shall constitute full and complete compensation for the performance of the work under this contract. It is understood and agreed, however, that the fixed fee shall be allowed the Contractor only for those services which are performed by the Contractor under Section 1.a. of the article entitled "Statement of Work," and that no fee shall be allowed the Contractor by the Government for those services which are performed by the Contractor for Constructors under Section 1.b. of such article.

2. *Fixed Fee.* The fixed fee payable to the Contractor for the performance of the work under this contract for the period July 1, 1970, through June 30, 1971, is One Hundred Twenty Thousand Dollars ($120,000.00).

• • • • •

ARTICLE VII——PAYMENTS AND ADVANCES

1. *Installments of Fixed Fee.* The fixed fee provided for in Article VI shall be paid in equal monthly installments as it accrues.

2. *Payments on Account of Allowable Cost.* The Contracting Officer and the Contractor shall agree as to the extent to which payment for allowable costs or

payments for other items specifically approved in writing by the Contracting Officer shall be made from advances of Government funds. The Contractor shall submit a separate voucher for each installment of the fixed fee as it accrues, and with the written approval of the Contracting Officer, may pay such installment of the fixed fee out of advances of Government funds.

3. *Special Bank Account—Use.* All advances of Government funds shall be withdrawn pursuant to a letter of credit in favor of the Contractor or the Contractor's bank, or, in the option of the Government, shall be made by check payable to the Contractor and shall be deposited only in the Special Bank Account established by an Agreement for Special Bank Account in the form and containing the provisions set forth in Appendix C of this contract. The Contractor shall likewise deposit in the Special Bank Account any other revenues received by the Contractor in connection with the work under this contract. No part of the funds in the Special Bank Account shall be (a) mingled with any funds of the Contractor or (b) used for a purpose other than that of making payments for costs allowable under this contract or payments for other items specifically approved in writing by the Contracting Officer and payments of the Contractor's fixed fee as provided for elsewhere in this contract. If the Contracting Officer shall at any time determine that the balance on such bank account exceeds the Contractor's current needs, the Contractor shall promptly make such disposition of the excess as the Contracting Officer may direct.

4. *Title to Funds Advanced.* Title to the unexpended balance of any funds advanced and of any bank account established pursuant to this article shall remain in the Government and be superior to any claim or lien of the bank of deposit or others. It is understood that an advance to the Contractor hereunder is not a loan to the Contractor, and will not require

the payment of interest by the Contractor, and that the Contractor acquires no right, title, or interest in or to such advance other than the right to make expenditures therefrom as provided in this article.

5. *Review and Approval of Costs Incurred.* The Contractor shall prepare and submit annually as of June 30, a voucher, for the total of net expenditures accrued (i.e., net costs incurred) for the period covered by the voucher, and the Commission, after audit and appropriate adjustment will approve such voucher. This approval by the Commission will constitute an acknowledgment by the Commission that the net costs incurred are allowable under the contract and that they have been recorded in the accounts maintained by the Contractor in accordance with the Commission accounting policies, but will not relieve the Contractor of responsibility for the Commission's assets in its care, for appropriate subsequent adjustments, or for errors later becoming known to the Commission.

* * * * *

9. *Revenues.* All revenues other than the Contractor's fixed fee or fees, if any, accruing to the Contractor in connection with the work under this contract shall be Government property and shall be deposited in the Special Bank Account to be available for payment of allowable cost under this contract.

* * * * *

ARTICLE IX—CONTRACTOR PROCUREMENT

* * * * *

4. In addition to procurement for its activities under this contract and for Constructors for the work under Contract No. AT(29-1)-1357, the Contractor shall procure such items for the use of the Commission and other Commission contractors as may be required by the Contracting Officer from time to time to the extent that funds are made available therefor by the Commission. This procurement for others shall be performed by the same methods, practices, and proce-

dures found acceptable by the Contracting Officer for the Contractor's own activities.

• • • • •

ARTICLE XII—PROPERTY

1. *Furnishing of Government Property.* The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

2. *Title to Property.* Title to all property furnished by the Government shall remain in the Government except as otherwise provided in this article. Except as otherwise provided by the Contracting Officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The Contractor shall make such disposition of rejected items as the Contracting Officer shall direct. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the Contractor, title to which vests in the Government under this section, are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose

its indentity as personalty by reason of affixation to any realty.

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9. *Property Management.* The Contractor shall establish and maintain a property management system, acceptable to the Contracting Officer, including stock control and disposal providing for all phases of supply activities and designed to procure, utilize, protect and control all property adequately. The property management system that has been approved by the Contracting Officer and is now in effect shall not be changed without the approval of the Contracting Officer. The property management activities shall be subject to inspection and audit by the Commission at all reasonable times.

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EXCERPTS FROM ATOMIC ENERGY COMMISSION CONTRACT AT(29-1)-1357 DATED JULY 1, 1970, WITH LOS ALAMOS CONTRACTORS, INC. (R. II)

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ARTICLE III—TERM

The term of this contract shall extend through June 30, 1975, unless sooner terminated in accordance with the provisions of the article entitled "Termination." At least six months prior to said June 30, 1975, the parties will confer to determine whether the contract should be extended, and if so, upon what terms. If the parties are unable to agree upon a basis for extending the contract term beyond the above date, the Commission may require the Contractor to perform for an additional period of six months or less beyond June 30, 1975, all or any part of the work which the Contractor is then performing under this contract, at a fee to be agreed upon by the parties as proportionate to the fee covering the final full fiscal year of this contract, based upon the estimated amount and character of the work to be performed during such additional period, as compared with the amount and character of work performed by the Contractor during such final full fiscal year. A failure to agree on such a fee under this article shall be deemed to be a dispute within the meaning of the article entitled "Disputes". Nothing contained in this article shall excuse the Contractor from proceeding with the prosecution of the work in accordance with the requirements of the Commission hereunder.

ARTICLE IV—PROGRAM DEVELOPMENT AND FINANCIAL PLANS; OBLIGATION OF FUNDS

1. *Program Development and Financial Plans.* Work programs and estimates of cost shall be developed on the basis of each fiscal year during the term of this contract. * * *

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2. *Obligation of Funds.* The amount presently obligated by the Government with respect to this contract is Sixteen Million Eight Hundred Nine Thousand Dollars ($16,809,000.00). Such amount may be increased unilaterally by the Commission by written notice to the Contractor and may be increased or decreased by written agreement of the parties (whether or not by formal modification of this contract). Estimated revenues and receipts from others from work and services to be performed under this contract are not included in the amount obligated with respect to this contract. Such revenues and receipts, to the extent actually received by the Contractor, shall be available and used for the payment of allowable costs as provided in the article entitled "Payments and Advances." Nothing in this Paragraph 2. is to be construed as authorizing the Contractor to exceed limitations stated in financial plans established by the Commission and furnished to the Contractor from time to time under this contract.

3. *Limitation on Payment by the Government.* Except as otherwise provided in this contract and except for costs which may be incurred by the Contractor pursuant to the article entitled "Termination" or costs of claims allowable under the contract accruing after completion or termination and not released by the Contractor at the time of financial settlement of the contract in accordance with the article entitled "Payments and Advances", payment by the Government under this contract on account of allowable costs shall not in the aggregate exceed the amount obligated with respect to this contract, less the Contractor's fixed fee. Unless expressly negated in this contract, payment on account of those costs excepted in the preceding sentence which are in excess of the amount obligated with respect to this contract shall be subject to the availability of (a) revenues and receipts deposited to the Government's account as provided in the article entitled "Payments and Ad-

vances", and (b) other funds which the Commission may legally use for such purpose; provided, the Commission will use its best efforts to obtain the appropriation of funds for this purpose if not otherwise available.

4. *Notices—Contractor Excused from Further Performance.* The Contractor shall notify the Commission in writing whenever the unexpended balance of funds (including revenues and receipts) available under Paragraph 2. above, plus the Contractor's best estimate of revenues and receipts to be received during the ninety day period hereinafter specified, is in the Contractor's best judgment sufficient to continue contract operations at the programmed rate for only ninety days and to cover the Contractor's unpaid fixed fee, and outstanding commitments and liabilities on account of costs allowable under the contract at the end of such period. Whenever the unexpended balance of funds (including revenues and receipts) available under Paragraph 2. above, less the amount of the Contractor's fixed fee then earned but not paid, is in the Contractor's best judgment either sufficient only to liquidate outstanding commitments and liabilities on account of costs allowable under this contract or is equal to zero, the Contractor shall immediately notify the Commission and shall make no further commitments or expenditures (except to liquidate existing commitments and liabilities), and, unless the parties otherwise agree, the Contractor shall be excused from further performance (except such performance as may become necessary in connection with termination by the Government) and the performance of all work hereunder will be deemed to have been terminated for the convenience of the Government in accordance with the provisions of the articles entitled "Termination".

5. *Financial Plans; Cost and Commitment Limitations.* In addition to the limitations provided for elsewhere

in this contract, the Commission may, through financial plans or other directives issued to the Contractor, establish controls on the cost to be incurred and commitments to be made in the performance of the contract work. Such plans and instructions may be amended or supplemented from time to time by the Commission. The Contractor hereby agrees to comply with the specific limitations (ceilings) on costs and commitments set forth in such plans and directives, to use its best efforts to comply with the other requirements of such plans and directives, and to promptly notify the Commission in writing whenever it has reason to believe the authorized financial levels of costs and commitments will be exceeded or substantially underrun.

6. *Government's Right to Terminate not Affected.* The giving of any notice under this article shall not be construed to waive or impair any right of the Government to terminate the contract under the provisions of the article entitled "Termination".

ARTICLE V—CHANGES

1. *Changes and Adjustment of Fee.* The Contracting Officer may at any time and without notice to the sureties, if any, issue written directions within the general scope of this contract requiring additional work or directing the omission of or variation in work covered by this contract. If any such direction results in a material change in the amount or character of the work described in the article entitled "Statement of Work", an equitable adjustment of the fixed-fee shall be made in accordance with the agreement of the parties and the contract shall be modified in writing accordingly. • • •

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ARTICLE VII—PAYMENTS AND ADVANCES

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3. *Special Bank Account—Use.* All advances of Government funds shall be withdrawn pursuant to a letter of credit in favor of the Contractor or the Contractor's bank or, in the option of the Government, shall be made by check payable to the Contractor and shall be deposited only in the Special Bank Account established by an Agreement for Special Bank Account in the form and containing the provisions set forth in Appendix C of this contract. The Contractor shall likewise deposit in the Special Bank Account any other revenues received by the Contractor in connection with the work under this contract. No part of the funds in the Special Bank Account shall be (a) mingled with any funds of the Contractor or (b) used for a purpose other than that of making payments for costs allowable under the contract or payments for other items specifically approved in writing by the Contracting Officer and payments of the Contractor's fixed fee as provided for elsewhere in this contract. If the Contracting Officer shall at any time determine that the balance on such bank account exceeds the Contractor's current needs, the Contractor shall promptly make such disposition of the excess as the Contracting Officer may direct.

4. *Title to Funds Advanced.* Title to the unexpended balance of any funds advanced and of any bank account established pursuant to this article shall remain in the Government and be superior to any claim or lien of the bank of deposit or others. It is understood that an advance to the Contractor hereunder is not a loan to the Contractor, and will not require the payment of interest by the Contractor, and that the Contractor acquires no right, title, or interest in or to such advance other than the right to make expenditures therefrom as provided in this article.

5. *Review and Approval of Costs Incurred.* The Contractor shall prepare and submit annually as of June 30, a voucher, for the total of net expenditures accrued (i.e., net costs incurred) for the period covered by the voucher, and the Commission, after audit and appropriate adjustment will approve such voucher. This approval by the Commission will constitute an acknowledgement by the Commission that the net costs incurred are allowable under the contract and that they have been recorded in the accounts maintained by the Contractor in accordance with the Commission accounting policies, but will not relieve the Contractor of responsibility for the Commission's assets in its care, for appropriate subsequent adjustments, or for errors later becoming known to the Commission.

6. *Financial Settlement.* The Government shall promptly pay to the Contractor the unpaid balance of allowable costs and fixed fee upon termination of the work, expiration of the term of the contract, or completion of the work and its acceptance by the Government after (1) compliance by the Contractor with the Commission's patent clearance requirements, and (2) the furnishing by the Contractor of:

a. An assignment of the Contractor's rights to any refunds, rebates, allowances, accounts receivable, or other credits applicable to allowable costs under the contract;

* * * * *

9. *Revenues.* All revenues other than the Contractor's fixed fee or fees, if any, accruing to the Contractor in connection with the work under this contract shall be Government property and shall be deposited in the Special Bank Account to be available for payment of allowable cost under this contract.

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ARTICLE IX—CONTRACTOR PROCUREMENT

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2. In addition to, and without derogation of any rights under section 1. of this article and any other provision in this contract, the Contractor shall require subcategories to furnish cost or pricing data, and shall include in such subcontracts the clause set forth in AECPR 9-3.814-50, except as otherwise directed or approved by the Commission.

3. Procurement or transfer of equipment, materials, supplies, or services from a Contractor-controlled source [any division or other organizational component of the prime contractor (exclusive of the contracting component) and any subsidiary or affiliate of the Contractor under a common control] shall be considered a procurement for the purposes of this article, excepting procurement or transfers from Constructors under Contract No. AT (29-1)-1357.

4. In addition to procurement for its activities under this contract and for Constructors for the work under Contract No. AT(29-1)-1357, the Contractor shall procure such items for the use of the Commission and other Commission contractors as may be required by the Contracting Officer from time to time to the extent that funds are made available therefor by the Commission. This procurement for others shall be performed by the same methods, practices, and procedures found acceptable by the Contracting Officer for the Contractor's own activities.

ARTICLE X—ACCOUNTS, RECORDS, AND INSPECTION

1. *Accounts.* The Contractor shall maintain a separate and distinct set of accounts, records, documents and other evidence showing and supporting all allowable costs incurred, revenues or other applicable credits, fixed-fee accruals, and the receipt, use, and disposition of all Government property coming into the possession of the Contractor under this contract. The system of

accounts employed by the Contractor shall be satisfactory to the Commission and in accordance with generally accepted accounting principles consistently applied and shall not be changed without the prior approval of the Contracting Officer.

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ARTICLE XI—EXAMINATION OF RECORDS

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3. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

ARTICLE XII—PROPERTY

1. *Furnishing of Government Property.* The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

2. *Title to Property.* Title to all property furnished by the Government shall remain in the Government except as otherwise provided in this article. Except as otherwise provided by the Contracting Officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government.

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EXCERPTS FROM ATOMIC ENERGY COMMISSION CONTRACT AT(29-1)-789, 12/31/73, W/WESTERN ELECTRIC CO. (R.II)

CONTRACT AT(29-1)-789

between

UNITED STATES ATOMIC ENERGY COMMISSION

and

WESTERN ELECTRIC COMPANY, INCORPORATED

Modification No. 29

Dated December 31, 1973

Effective January 1, 1974

Including as Appendix A
the Contract between
SANDIA CORPORATION

and

WESTERN ELECTRIC COMPANY, INCORPORATED

Dated December 31, 1973

Effective January 1, 1974

ARTICLE III. Reimbursement of Costs

1. The services of Sandia Corporation and of Western, Bell Laboratories, and any other Bell System company which may be called upon to render services hereunder, other than communication services, shall be rendered without fee or profit of any kind.

2. Since Sandia Corporation was created for the purpose of operating Commission facilities and performing work under this Contract and will engage in no activities other than as herein provided, all costs and expenses incurred by Sandia Corporation during the term hereof shall be reimbursed by the Commission, including, specifically, payments by Sandia Corporation to Western pursuant to the contract hereto attached as Appendix A and, in view of the fact that such undertaking was requested by the Government and contemplated that Western should sustain no loss thereby, it is agreed that no cost or expense shall be denied reimbursement as outside the scope of this Contract, unless the Commission shall establish that such cost or expense resulted from willful misconduct or bad faith on the part of some corporate officer or officers of Sandia Corporation or of any other person having complete or substantially complete charge of the Sandia Albuquerque or Livermore Laboratories. Any dispute as to whether such an item is reimbursable shall be determined pursuant to Article XII, Disputes.

3. Sandia Corporation may make advances to subcontractors, suppliers, and materialmen for labor or services or may pay for materials in advance of delivery, provided that the prior written approval of the Commission shall be obtained for any such advance in excess of $15,000.

4. Sandia Corporation shall apply all revenues received in its operations hereunder in reduction of costs here-

under, except as shall be otherwise directed in writing by the Commission.

5. Financial Plan, Costs Limitation. In addition to the limitations provided for elsewhere in this Contract, the Commission may through Financial Plans issued to Sandia Corporation establish controls on the costs to be incurred in the performance of the contract work. Such plans may be amended or supplemented from time to time by the Commission. Sandia Corporation agrees to use its best efforts to comply with such plans and to notify the Commission promptly in writing whenever it has reason to believe the authorized financial levels of costs will be exceeded or substantially underrun. Sandia Corporation hereby agrees to comply with specific limitations (ceilings) on costs as discussed with and accepted by Sandia Corporation in advance and as set forth in such plans.

ARTICLE IV. Advances and Vouchering

1. Neither Western nor Sandia Corporation shall be required to provide funds for operations under this Contract.
2. The Commission shall provide funds by either of the following methods or by any other method mutually agreed upon by Sandia Corporation and the Commission:
   a. by periodic advances to Sandia Corporation of the estimated amount required for the succeeding period disbursements, making supplementary advances whenever necessary, or
   b. by means of a Letter of Credit as authorized through the United States Treasury Department to a Federal Reserve Bank for the account and responsibility of the Commission and in favor of Sandia Corporation. Payment vouchers will be drawn by Sandia Corporation against the Letter

of Credit as needed for daily disbursements. All such advances or payment voucher proceeds and revenues received shall (except for petty cash and working balances) be deposited in special bank accounts under arrangements approved by the Commission.

3. Disbursements by Sandia Corporation hereunder shall apply against funds provided pursuant to Paragraph 2. of this Article IV in accordance with arrangements mutually agreed upon by Sandia Corporation and the Commission.

4. The total amount which Sandia Corporation is authorized to expend or commit under this Contract and which shall be a charge against such obligational authority as the Commission shall designate, shall be the then current total obligation of this Contract established by the Commission from time to time and evidenced by a certificate of the Manager, Albuquerque Operations Office, less the amounts previously committed by Sandia Corporation. The total obligation of this Contract will be increased by the Commission from time to time, in accordance with agreed quarterly estimates, to authorize commitments on approved programs of work and to provide for payment of costs incurred under this Contract. In addition to said total, Sandia Corporation is authorized to expend or commit under this Contract such additional sums as may be specified in "cash purchase orders" received by Sandia Corporation from other Commission Contractors and other revenues received.

ARTICLE V. Assumption of Risk by Government

1. The parties recognize that the work under this Contract involves unusual, unpredictable and abnormal risks. In view of these circumstances and the no-profit feature of this Contract, neither Western, San-

dia Corporation, Bell Laboratories, nor any company of the Bell System, shall be liable for, and the Government shall indemnify and hold them harmless against, any delay, failure, loss, expense (including expense of litigation), or damage (including personal injuries and deaths of persons and damage to property) of any kind and for any cause whatsoever, arising out of or connected with the work, and whether or not any employee or employees of any such company is or are responsible therefor. Provided, that neither Western, Sandia Corporation, Bell Laboratories, nor any company of the Bell System, shall be indemnified and held harmless for any cost or expense denied reimbursement pursuant to Article III, Paragraph 2. * * *

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ARTICLE VI. Property

1. Title to all property of any kind whatsoever acquired by Sandia Corporation shall pass to the Government when it passes from the vendor, except as may be directed by the Commission. Sandia Corporation may transfer or otherwise dispose of Government-owned property in its possession to such parties and upon such terms and conditions as the Commission may approve.

* * * * *

ARTICLE IX. Patents and Inventions

1. Whenever any invention or discovery is made or conceived (a) by an employee of Sandia Corporation (other than such clerical or manual labor personnel as will not have access to technical data) in the course of, in connection with, or under the terms of this Contract or (b) by any employee of a Bell System company during the period of his loan to Sandia Corporation, pursuant to Item 2. of Article II of Appendix A, or in the performance of work pursuant to Item 3. or

7. of said Article, Sandia Corporation shall furnish the Commission with complete information thereon; and the Commission shall have the sole power to determine whether or not and where a patent application shall be filed, and to determine the disposition of the title to and the rights under any application or patent that may result and the judgment of the Commission on these matters shall be final; provided, however, that in any event there shall be reserved to Western, American Telephone and Telegraph Company and other companies of the Bell System nonexclusive, irrevocable, royalty-free licenses under said patents limited to make and to have made, use, lease and sell public service communication equipment. Except as otherwise authorized in writing by the Commission, Sandia Corporation will obtain from all such employees patent agreements and other documents to effectuate the purpose of this paragraph.

2. Under all patents now or during the term of this Contract owned or controlled by Western or as to which it has the right to grant licenses, without incurring an obligation to pay royalties or other compensation solely on account of the licenses herein granted, the invention or inventions of which are embodied or utilized by Sandia Corporation during the term of this Contract in the manufacture, design or development of Sandia Corporation products that utilize fissionable material or atomic energy for a military weapon or are otherwise used in or with such atomic energy military weapon, Western hereby grants and agrees to grant to the Government an irrevocable, nonexclusive, royalty-free license for the entire terms of said patents, to make and to have made, to use and to have used and to dispose of said products according to law.

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ARTICLE XI. General. . . .

2. Procurement shall be conducted by Sandia Corporation in accordance with the policies and practices as agreed upon by Sandia Corporation and the Commission. The starting point shall be the policies and practices of Sandia Corporation in effect on the 1st day of January, 1974. If either Sandia or the Commission desires to propose changes in Sandia's procurement policies and practices, such proposed changes shall be submitted in writing to the other party and such changes, unless objected to as hereinafter provided, shall become effective 30 days after receipt of the proposed change. If either Sandia or the Commission desires to object to the proposed change they shall object in writing, prior to the expiration of said 30-day period, setting forth in detail their grounds of objection. If such an objection is made the parties shall meet to resolve the questions and, pending such resolution, the Sandia policies and practices in effect prior to the proposed change shall remain in force.

Sandia Corporation shall, in accordance with such policies and practices, be responsible for determining the kind and quantity of materials to be procured, selection of and negotiations with suppliers, negotiation of price or price basis and other purchase terms and conditions and audit and settlement of vendors' accounts; provided, however, that any procurement transaction in excess of $100,000 shall be subject to written approval of the Commission, and in such cases Sandia Corporation shall also furnish to the Commission a copy of its written justification, indicating the considerations on which the procurement is considered to be most advantageous to the Government, taking into consideration price, quality and other factors. All purchase orders, subcontracts and other commit-

ments shall be made in the name of Sandia Corporation, and shall (excepting contracts of employment) be reduced to writing if for more than $250. Sandia Corporation shall insert in such purchase orders, subcontracts and other commitments, such clauses as are required by statute, and Executive Order, and such clauses respecting Government property, security, patent rights, taxes, retention of records, Contract Work Hours and Safety Standards Act—Overtime Compensation, Davis-Bacon Act, Equal Opportunity, Walsh-Healey Public Contracts Act, Buy American Act, Renegotiation Act, Service Contract Act of 1965 and contingent fees, as the Commission may require. Sandia Corporation shall insert into its purchase orders, subcontracts and other commitments, let on a cost reimbursement basis and on a fixed price basis when the costs incurred are a factor in future price redeterminations, examination of records provisions as the Commission may require. Sandia Corporation shall observe the Commission's requirements respecting acquisition and use of property, supplies and transportation services available to the Government.

3. Sandia Corporation shall use a system of accounting and property control conforming to sound accounting principles, followed by Western and adapted to provide accounting and property information required by the Commission.

4. Sandia Corporation shall conform to all health, safety and fire protection regulations and requirements of the Commission, and shall take all reasonable steps and precautions to protect health and minimize danger from all hazards to life and property.

5. Western shall be responsible for, and shall supervise, performance by Sandia Corporation of its obligations under Paragraphs 1. through 3. of this Article. At least once annually Western shall audit the records

and review the practices of Sandia Corporation under Paragraphs 1. through 3. of this Article and shall furnish to the Commission copies of such audit report.

6. If the General Manager of the Commission shall raise a question with Western as to the reasonableness of any practice followed pursuant to Paragraphs 1. through 5. of this Article, which shall not be settled by mutual agreement, then the question shall be determined by the Commission itself and its determination shall be binding on Western, Sandia Corporation and the Government.

7. Sandia Corporation shall report to the Commission on activities under this Contract in such form and at such time as may be required by the Commission. The Commission shall have the right at all reasonable times to inspect and audit in such manner as it deems appropriate all activities of Sandia Corporation.

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APPENDIX A

This Contract made the 31st day of December, 1973, by and between SANDIA CORPORATION (hereinafter referred to as "Sandia"), a corporation of the State of Delaware, and WESTERN ELECTRIC COMPANY, INCORPORATED (hereinafter referred to as "Western"), a corporation of the State of New York;

WITNESSETH THAT:

WHEREAS, Western has entered into Modification No. 29 of Contract No. AT(29-1)-789 with the United States of America, acting through the Atomic Energy Commission (hereinafter referred to as the "Commission"), to continue to furnish the services provided for therein; and . . .

NOW THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the parties hereto agree that the contract between the parties as heretofore amended, shall, effective as to performance starting January 1, 1974, be amended to read in its entirety as follows: . . .

ARTICLE II. Scope of the Work

Western shall:

Item 1. Transfer of Employees. From time to time select such of the management and technical personnel of the Bell System as Western may deem to be needed on a full-time basis for the work under Contract AT(29-1)-789. . .

Item 3. Laboratories Research and Development. Arrange for Bell Telephone Laboratories, Incorporated (herein referred to as the "Laboratories") to do such research and development in connection with the work under Contract AT(29-1)-789 as the Commission shall approve and Western and Sandia may deem the Labora-

tories is peculiarly fitted for and in a position to undertake;

Item 4. Products of Western. Furnish products of Western on terms and conditions agreed upon from time to time, provided that the prior written approval of the Commission shall be obtained for any purchase exceeding $500;

Item 5. Supervision and Audit. Furnish services and incur costs and expenses as required for performance by Western of its obligations under Article XI of said Modification No. 29 of Contract AT(29-1)-789;

Item 6. Headquarters Staff. Furnish services of executives of Western and the Laboratories and of Western's headquarters staff to the extent that Western and Sandia may deem them needed, ...

Item 7. General. Furnish such additional services and incur such additional costs and expenses incidental to or necessary for the performance and experimentation or termination of Contract AT(29-1)-789 as shall from time to time be agreed upon by Western and Sandia.

ARTICLE III. Reimbursement of Costs and Payment

Sandia shall reimburse Western and shall pay to Western, upon submission of invoices therefor monthly or as otherwise agreed by the parties, the following:

1. *Transferred Employees.* With respect to employees transferred to the employ of Sandia under Item 1. of Article II, (a) sums payable monthly, determined by applying to the aggregate salaries paid by Sandia to employees so transferred by each employer granting leaves of absence for such employment, the current pension and group insurance accrual rates, as adjusted from time to time, used by it in making payments into its Pension Trust Fund or for group insurance, as the case may be; and (b) sums equal to disability and death benefits paid to such employees, or their beneficiaries, pursuant to Article IV, plus an amount derived by ap-

plying said current pension and group insurance accrual rates to such disability benefits.

2. *Loaned Employees and Auditing Services.* With respect to employees loaned to Sandia under Item 2. of Article II and employees performing auditing services furnished under Item 5. of Article II, sums equal to the salaries paid to said employees by their employers during the period of such performance, plus (a) amounts derived by application to such sums of a rate to be negotiated following the close of each rate period to cover the employer's other employment costs (including employee security accruals, vacation, holiday, sickness and absence allowances and other payroll taxes and payroll expense) and (b) travel and living expense while away from their work location computed in accordance with their employer's normal practice. The rates referred to in (a), above, shall be negotiated on the basis of actual cost experience for the period, shall be reviewed by the Commission (which review may include such audit as the Commission may require), and the new rate agreed to be in effect for each period shall be incorporated in a supplement to this Contract. The rate period shall be the calendar year. Pending the establishment of a negotiated rate for any period, provisional payment shall be made at a billing rate approved by the Commission.

3. *Laboratories Research and Development.* For research and development by the Laboratories under Item 3. of Article II, reimbursement for expenditures incidental to and necessary for the performance of such work, in accordance with the provisions of Schedule A hereto attached.

4. *Products of Western.* For products of Western furnished under Item 4. of Article II, agreed prices, which in the case of standard products shall be those applicable from time to time to Western's sales of such products to the Government and which in the case of other products shall be approved by the Commission.

5. *Other Services and Costs.* For services furnished and in reimbursement of Western's and the Laboratories' costs and expenses furnished or incurred such sums as may be agreed upon by Western and Sandia, subject to approval by the Commission, as follows:

(a) With respect to supervisory services under Item 5., "Supervision and Audit," and with respect to Item 6., "Headquarters Staff," based upon a statement to be submitted by Western prior to the beginning of each quarter, covering services to be furnished during such period.

(b) With respect to Item 7., "General," based upon statements to be submitted by Western from time to time as such services are agreed upon or such costs and expenses are incurred.

6. *Refunds.* Rebates, discounts, refunds and any other similar revenues obtained by Western in connection with this Contract shall be applied in reduction of Western's costs hereunder.

ARTICLE IV. Status of Transferred Employees

Employees transferred under Item 1. of Article II, on leaves of absence from their prior employers, shall be employees of Sandia and under its sole control. The initial salary to be paid by Sandia to such employees and subsequent increases in salary shall be as agreed by Sandia and Western, having in view the eventual return of such employees to their prior employment. Such employees who become disabled or die while in the employ of Sandia, or their beneficiaries, shall receive from the employer granting leave of absence for such employment, accident and sickness and disability benefits and death benefits equal to those that, in accordance with the "Plan for Employees' Pensions, Disability Benefits and Death Benefits" of said employer, would have been payable if they had remained in such prior employment.

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SCHEDULE A

(attached to Contract between Sandia Corporation and Western Electric Company, Incorporated, as amended December —, 1973, effective January 1, 1974)

Reimbursement for expenses incidental to and necessary for performance of research and development by the Laboratories under Item 3. of Article II, as provided in Paragraph 3. of Article III of the attached contract, shall consist of the following:

(a) The cost to the Laboratories of materials charged in accordance with sound accounting methods consistently followed by the Laboratories, pursuant to which due credit is recognized in overhead for any scrap or surplus materials which are sold, including (i) the net cost to the Laboratories, after deducting all discounts, of materials and parts purchased directly for the performance of this Contract; (ii) the cost to the Laboratories of articles customarily produced or assembled by Western in the regular course of its business; (iii) the cost to the Laboratories of materials, not covered by the preceding section (ii), withdrawn from store or stockrooms other than the Laboratories'.

(b) The salaries and wages of scientists, technicians, draftsmen, workmen and others directly engaged in the performance of work hereunder and properly allocable thereto as recorded by departments in the Laboratories' accounts, and at rates computed in accordance with sound accounting methods consistently followed by the Laboratories.

(c) Cost of transportation and subsistence customarily allowed by the Laboratories for all personnel while in travel status, communication expenses, and incoming and outgoing shipping charges incurred directly in the performance of this Contract.

(d) Purchase, construction and installation or rental cost to the Laboratories of facilities necessary for the performance of this Contract, including machinery, furniture and fixtures, tools, test equipment and similar items.

(e) Cost to the Laboratories of services performed in accordance with the provisions of this Contract and supplied by other concerns including the cost to the Laboratories of services performed for the Laboratories by other Bell System companies and the cost to the Laboratories of services supplied by employees of Western and others), not otherwise provided for herein.

(f) The cost of correction and/or replacement of rejected material and/or workmanship and the cost of any rectifications required in connection with the work called for under this Contract, whether before or after completion of such work as well as the cost of any restoration or repairs of such work occasioned by or in connection with inspection, demonstration, use or test thereof.

(g) Such other costs to the Laboratories as shall by agreement of the parties hereto, and with the approval of the Commission, be included in the cost of the work.

(h) Costs of the above character incurred prior to but in anticipation of the execution of this Contract.

(i) Overhead, indirect charges and other elements of costs of the Laboratories not specifically recovered in direct charges hereunder computed by the application of overhead rates (negotiated as described in subparagraph (k) below) to salaries and wages included in subparagraph (b) of employees in the respective departments of the Laboratories.

(j) A reasonable and proper proportionate share of Western's cost of administration applicable and allocable to the performance of Item 3. of Article II of this Contract, other than costs incurred by the Laboratories, and a reasonable and proper proportionate share of expense of general engineering performed by Western and the Laboratories in connection with Government business which, because of its nature and scope, cannot be related

specifically to individual orders and projects, computed by the application of overhead rates (negotiated as described in subparagraph (k), below) to the total of sums payable under subparagraphs (a) to (i), inclusive.

(k) The overhead rates to be applied under this Contract under subparagraphs (i) and (j), above, shall be those negotiated by Sandia and Western for successive calendar year periods and approved by the Commission on the basis of actual cost experience for each such period as determined by audit. Any such audit may be performed, at the option of the Commission, by a Department of Defense audit agency, by the Commission itself, or by both. The actual overhead rates approved by the Commission to be in effect for each such period shall be incorporated in a supplement to this Contract. Pending the approval of overhead rates by the Commission for any such period provisional payment shall be made at billing rates approved by the Commission.

APPENDIX B

(D) *Compliance with Labor Statutes*

1. *Contract Work Hours and Safety Standards Act—Compensation.* . . .

   a. *Overtime Requirements.* Neither Sandia Corporation nor any subcontractor . . . may require . . . work in excess of eight hours in any calendar day . . . unless . . . compensation at a rate not less than one and one-half time . . . basic rate of pay for all such hours worked in excess of eight hours . . .

   b. *Violation; Liability for Unpaid Wages; Liquidated Damages.* In the event of any violation of the provisions of Paragraph a., Sandia Corporation and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. . . .

* * * * *

(P) *Conduct of Employees*

1. *President of Sandia Corporation.* During the performance of this Contract, the work provided for under the contract shall be under the direction of the President of Sandia Corporation who shall be a person acceptable to the Commission.

ZIA CONTRACT MODIFICATION NO. 66,
SUPPLEMENTAL EXH. TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT,
7/6/76, pp. 1 and 12 (R.II)

UNITED STATES ENERGY RESEARCH
AND DEVELOPMENT ADMINISTRATION
P. O. BOX 5400
ALBUQUERQUE, NEW MEXICO 87115

Modification No. 66
Supplemental Agreement to
Contract No. W-17-028-ENG-90

SUPPLEMENTAL AGREEMENT

THIS SUPPLEMENTAL AGREEMENT, entered into effective this 1st day of April 1976, by and between the UNITED STATES OF AMERICA (hereinafter called "Government"), represented by the UNITED STATES ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION (hereinafter called the "ERDA"), and THE ZIA COMPANY (hereinafter called the "Contractor") a corporation organized and existing under the laws of the State of Delaware.

WITNESSETH THAT:

WHEREAS, the Contractor is now performing services for the Government under Contract No. W-17-028-ENG-90, which was initially executed on behalf of the Government by the War Department on April 1, 1946; twice amended and as amended transferred to the United States Atomic Energy Commission on January 1, 1947, by Executive Order 9816; and thereafter amended by Modifications 3 through 65, which among other things extended the term through March 31, 1976; and

WHEREAS, it is now desired by the ERDA to extend the term of the contract through December 31, 1980; and

ARTICLE VI—ALLOWABLE COSTS AND FIXED FEE

1. *Compensation for Contractor's Services—Limitation of Government's Financial Obligations.* As compensation for the performance of the work under this contract, the Contractor shall be paid a fixed fee as hereinafter provided. It is understood and agreed, however, that the fixed fee shall be allowed the Contractor only for those services which are performed by the Contractor under Section 1.a. of the article entitled "Statement of Work," and that no fee shall be allowed the Contractor by the Government for those services which are performed by the Contractor for Constructors under Section 1.b. of such article. Payment to the Contractor of the fixed fee and payment, as herein provided, of the allowable cost, as hereinafter defined, shall constitute full and complete satisfaction of the Government's financial obligations under this contract.

2. *Fixed Fee.* The fixed fee payable to the Contractor for the performance of the work under this contract for the period April 1, 1976 through September 30, 1976, is One Hundred Sixteen Thousand Eight Hundred Dollars ($116,800.00). In agreeing upon the fixed fee to be paid, the amount and character of the work which the parties contemplated would be performed by the Contractor during the period April 1, 1976 through September 30, 1976, is that work reflected in the work program developed pursuant to the provisions of Paragraph 1.a. of the article entitled "Program Development and Financial Plans; Obligation of Funds." The presently estimated cost of such work is Ten Million Two Hundred Forty-eight Thousand Dollars ($10,248,000.00) exclusive of the Contractor's fixed fee.

MODIFICATION NO. 30 7/22/77 TO WESTERN ELECTRIC CO. CONTRACT NO. AT(29-1)-789 (R.II)

SUPPLEMENTAL AGREEMENT

This SUPPLEMENTAL AGREEMENT effective July 1, 1977, between THE UNITED STATES OF AMERICA (hereinafter called the "Government"), represented by the undersigned Contracting Officer of the UNITED STATES ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION (hereinafter called "ERDA"), previously represented by the UNITED STATES ATOMIC ENERGY COMMISSION (hereinafter called the "Commission"), and WESTERN ELECTRIC COMPANY, INCORPORATED (hereinafter called "Western"), a corporation of the State of New York,

WITNESSETH THAT:

WHEREAS, effective July 1, 1949, the Commission and Western entered into this contract for the operation of facilities and performance of work as herein provided; and

WHEREAS, the contract has been amended by Modifications 1 through 29; and

WHEREAS, effective January 19, 1975, the Commission was abolished and ERDA was established pursuant to the Energy Reorganization Act of 1974 (Public Law 93-438); and

WHEREAS, the functions and responsibilities of the Commission with respect to this contract have been transferred by operation of law to ERDA; and

WHEREAS, the parties recognize that under this contract and the long-standing relationship and practice of

the parties hereunder Sandia Corporation acts and has acted as an agent for and on behalf of ERDA and the Commission for certain purposes; and

WHEREAS, for the benefit of persons who are not parties and not familiar with the contractual relationships and practices hereunder, the parties desire to have the contract reflect the long-standing agency status and authority of Sandia Corporation for certain purposes; and

WHEREAS, this Supplemental Agreement is authorized by Public Law 93-438 and other applicable law.

NOW THEREFORE, the parties hereto agree that said Contract AT(29-1)-789, as previously amended, is further amended as follows:

The following article is added to the contract as Article XX:

Article XX. Status and Authority of Sandia Corporation as an Agent of ERDA

Under the provisions of this contract, Sandia Corporation has performed and will continue to perform as a management contractor of ERDA. On the basis of certain provisions of this contract and the long-standing relationship and practice of the parties hereunder, it is recognized that Sandia Corporation acts as an agent for and on behalf of ERDA for certain purposes. Particular provisions and features of the contractual relationship which establish the agency status of Sandia Corporation and the extent of the status and authority thereby created include, but are not limited to, the following:

1. Only ERDA funds are to be used in the performance of this contract by Sandia Corporation, and no funds of Sandia Corporation or of Western are required. The funds of ERDA made available for performance of this contract pursuant to

the provisions hereof and pursuant to any special bank accounts established hereunder, including all revenues received by Sandia Corporation in the conduct of operations hereunder, are and shall remain the funds of ERDA until expended and shall not at any time become the funds of Sandia Corporation or Western. Sandia Corporation acts as agent for and on behalf of ERDA in disbursing ERDA funds, by the drawing of checks on special bank accounts or by any other method approved by ERDA, for the payment and satisfaction of all obligations properly incurred by Sandia on behalf of ERDA in accordance with the provisions of this contract.

2. No property of Western is required to be used in performance of this contract. Sandia Corporation has no assets other than $1000 paid-in capital necessary for incorporation which is held in U.S. Government bonds. Except as provided in this contract and in performance thereof, Sandia Corporation shall not purchase or otherwise acquire property of any kind. Sandia Corporation in the performance of this contract acts as the agent of ERDA in the purchase, lease, or other acquisition, and in the management, maintenance, protection, safeguarding, sale, and disposition of all property of any kind whatsoever, real or personal, used in the performance of this contract.

3. All of the rights, benefits, and advantages flowing to Sandia Corporation from all transactions, contracts and other arrangements of any kind entered into by Sandia Corporation in performance of this contract in accordance with its terms are acquired by Sandia Corporation for the sole benefit of ERDA and on behalf of ERDA. Subject to compliance with other provisions of this contract, Sandia Corporation is authorized to

pledge the credit of the United States in any and all such transactions, contracts, and other arrangements.

4. ERDA considers all obligations properly incurred in accordance with the provisions of this contract to be ERDA obligations from their inception. Sandia Corporation acts as agent of ERDA in making appropriate payments to all obligees and is responsible for taking any and all other actions as may be necessary for appropriate and timely discharge of all such ERDA obligations. The purpose of this article is to recognize and express existing relationships. This article shall not be construed to modify any other provisions of the contract nor shall it create rights or obligations not otherwise provided for in the contract.

IN WITNESS WHEREOF, the parties hereto have executed this Supplemental Agreement in several counterparts.

THE UNITED STATES OF AMERICA

By: U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

Date: 22 Jul. 1977

By: /s/ Herman E. Roser
Manager
Albuquerque Operations Office
Contracting Officer

ATTEST:

WESTERN ELECTRIC COMPANY, INCORPORATED

/s/ [Illegible]
Assistant Secretary

By: /s/ James G. Herbert
Executive Vice President

[SEAL]

Sandia Corporation hereby becomes a party to the above Supplemental Agreement, assuming all of the obligations therein imposed upon it.

ATTEST:

/s/ [Illegible]
Secretary

SANDIA CORPORATION

By: /s/ Morgan Sparks
President

MODIFICATION NO. M069 7/21/77 TO
ZIA CONTRACT NO. EY-76-C-04-0090, FORMERLY
CONTRACT NO. W-17-028-Eng-90 (R.II)

UNITED STATES ENERGY RESEARCH AND
DEVELOPMENT ADMINISTRATION
P.O. BOX 5400
ALBUQUERQUE, NEW MEXICO 87115

SUPPLEMENTAL AGREEMENT

This SUPPLEMENTAL AGREEMENT entered into effective July 1, 1977, by and between THE UNITED STATES OF AMERICA (hereinafter called the "Government"), represented by the UNITED STATES ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION (hereinafter called "ERDA"), and THE ZIA COMPANY (hereinafter called the "Contractor"), a corporation organized and existing under the laws of the State of Delaware.

WITNESSETH THAT:

WHEREAS, the Contrator is now performing services for the Government under Contract No. W-17-028-ENG-90, which was initially executed on behalf of the Government by the War Department on April 1, 1946; twice amended and as amended transferred to the United States Atomic Energy Commission on January 1, 1947, by Executive Order 9816; and thereafter amended by Modifications 3 through 65; thereafter, as amended, transferred to ERDA, redesignated Contract EY-76-C-04-0090 and further amended by Modifications 66 through 68; and

WHEREAS, the parties recognize that under this contract and the long-standing relationship and practice of the parties hereunder the Contractor acts and has acted as an agent for and on behalf of ERDA and the Commission for certain purposes; and

WHEREAS, for the benefit of persons who are not parties and not familiar with the contractual relationships and practices hereunder, the parties desire to have the contract reflect the long-standing agency status and authority of the Contractor for certain purposes; and

WHEREAS, this Supplemental Agreement is authorized by and executed under Public Law 93-438 and other applicable law in the interest of the common defense and security.

NOW THEREFORE, the parties hereto agree that the contract, as previously amended, is further amended in the following particulars only:

The following article is added to the contract as Article LIII:

ARTICLE LIII—STATUS AND AUTHORITY OF THE CONTRACTOR AS AN AGENT OF ERDA

Under the provisions of this contract, the Contractor has performed and will continue to perform as a management contractor of ERDA. On the basis of certain provisions of this contract and the long-standing relationship and practice of the parties hereunder, it is recognized that the Contractor acts as an agent for and on behalf of ERDA for certain purposes. Particular provisions and features of the contractual relationship which establish the agency status of the Contractor and the extent of the status and authority thereby created include, but are not limited to, the following:

1. Only ERDA funds are to be used in the performance of this contract by the Contractor, and no funds of the Contractor are required. The funds of ERDA made available for performance of this contract pursuant to the provisions hereof and pursuant to any special bank accounts established hereunder, including all revenues received

by the Contractor in the conduct of operations hereunder (excluding the fees paid to the Contractor), are and shall remain the funds of ERDA until expended and shall not at any time become the funds of the Contractor. The Contractor acts as agent for and on behalf of ERDA in disbursing ERDA funds, by the drawing of checks on special bank accounts or by any other method approved by ERDA, for the payment and satisfaction of all obligations properly incurred by the Contractor on behalf of ERDA in accordance with the provisions of this contract.

2. No property of the Contractor is required to be used or shall be used in performance of this concontract. In the performance of this contract the Contractor acts as the agent of ERDA in the purchase, lease, or other acquisition, and in the management, maintenance, protection, safeguarding, sale, and disposition of all property of any kind whatsoever, real or personal, used in the performance of this contract.

3. All of the rights, benefits, and advantages flowing to the Contractor from all transactions, contracts and other arrangements of any kind entered into by the Contractor in performance of this contract in accordance with its terms are acquired by the Contractor for the sole benefit of ERDA and on behalf of ERDA. Subject to compliance with other provisions of this contract, the Contractor is authorized to pledge the credit of the United States in any and all such transactions, contracts, and other arrangements.

4. ERDA considers all obligations properly incurred in accordance with the provisions of this contract to be ERDA obligations from their inception. The Contractor acts as agent of ERDA in

making appropriate payments to all obligees and is responsible for taking any and all other actions as may be necessary for appropriate and timely discharge of all such ERDA obligations.

The purpose of this article is to recognize and express existing relationships. This article shall not be construed to modify any other provisions of the contract (including, but not limited to, the article entitled Allowable Costs, Base Fee and Award Fee) nor shall it create rights or obligations not otherwise provided for in the contract.

IN WITNESS WHEREOF, the parties hereto have executed this Supplemental Agreement in several counterparts.

UNITED STATES OF AMERICA

By: ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

Date: Jul 21 1977 By: /s/ Herman E. Roser
HERMAN E. ROSER,
Manager
Albuquerque Operations Office
Contracting Officer

THE ZIA COMPANY

Date: 7/21/77 By: /s/ Illegible
[Illegible]

Title: President

MODIFICATION NO. M059, 7/21/77 TO LACI CONTRACT NO. EY-76-C-04-1357, FORMERLY CONTRACT NO. AT(29 1)—1357 (R.II)

UNITED STATES
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
P. O. BOX 5400
ALBUQUERQUE, NEW MEXICO 87115

SUPPLEMENTAL AGREEMENT

This SUPPLEMENTAL AGREEMENT entered into effective July 1, 1977, by and between THE UNITED STATES OF AMERICA (hereinafter called the "Government"), represented by the UNITED STATES ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION (hereinafter called "ERDA"), and LOS ALAMOS CONSTRUCTORS, INC. (hereinafter called the "Contractor"), a corporation organized and existing under the laws of the State of New Mexico.

WITNESSETH THAT:

WHEREAS, the Contractor is now performing services for the Government under this contract, originally designated Contract AT(29-1)-1357, which was initially executed on behalf of the Government by the Atomic Energy Commission on March 31, 1953; thereafter amended by Modifications 1 through 55; thereafter, as amended, transferred to ERDA, redesignated Contract E(29-1)-1357, and subsequently redesignated Contract EY-76-C-04-1357 and further amended by Modifications 56 through 58; and

WHEREAS, the parties recognize that under this contract and the longstanding relationship and practice of the parties hereunder the Contractor acts and has acted as an agent for and on behalf of ERDA and the Commission for certain purposes; and

WHEREAS, for the benefit of persons who are not parties and not familiar with the contractual relationships and practices hereunder, the parties desire to have the contract reflect the long-standing agency status and authority of the Contractor for certain purposes; and

WHEREAS, this Supplemental Agreement is authorized by and executed under Public Law 93-438 and other applicable law in the interest of the common defense and security.

NOW THEREFORE, the parties hereto agree that the contract, as previously amended, is further amended in the following particulars only:

The following article is added to the contract as Article XLIX:

ARTICLE XLIX—STATUS AND AUTHORITY OF THE CONTRACTOR AS AN AGENT OF ERDA

Under the provisions of this contract, the Contractor has performed and will continue to perform as a management contractor of ERDA. On the basis of certain provisions of this contract and the longstanding relationship and practice of the parties hereunder, it is recognized that the Contractor acts as an agent for and on behalf of ERDA for certain purposes. Particular provisions and features of the contractual relationship which establish the agency status of the Contractor and the extent of the status and authority thereby created include, but are not limited to, the following:

1. Only ERDA funds are to be used in the performance of this contract by the Contractor, and no funds of the Contractor are required. The funds of ERDA made available for performance of this contract pursuant to the provisions hereof and pursuant to any special bank accounts es-

tablished hereunder, including all revenues received by the Contractor in the conduct of operations hereunder (excluding the fees paid to the Contractor), are and shall remain the funds of ERDA until expended and shall not at any time become the funds of the Contractor. The Contractor acts as agent for and on behalf of ERDA in disbursing ERDA funds, by the drawing of checks on special bank accounts or by any other method approved by ERDA, for the payment and satisfaction of all obligations properly incurred by the Contractor on behalf of ERDA in accordance with the provisions of this contract.

2. No property of the Contractor is required to be used or shall be used in performance of this contract. In the performance of this contract the Contractor acts as the agent of ERDA in the purchase, lease, or other acquisition, and in the management, maintenance, protection, safeguarding, sale, and disposition of all property of any kind whatsoever, real or personal, used in the performance of this contract.

3. All of the rights, benefits, and advantages flowing to the Contractor from all transactions, contracts and other arrangements of any kind entered into by the Contractor in performance of this contract in accordance with its terms are acquired by the Contractor for the sole benefit of ERDA and on behalf of ERDA. Subject to compliance with other provisions of this contract, the Contractor is authorized to pledge the credit of the United States in any and all such transactions, contracts, and other arrangements.

4. ERDA considers all obligations properly incurred in accordance with the provisions of this contract to be ERDA obligations from their inception. The

Contractor acts as agent of ERDA in making appropriate payments to all obligees and is responsible for taking any and all other actions as may be necessary for appropriate and timely discharge of all such ERDA obligations.

The purpose of this article is to recognize and express existing relationships. This article shall not be construed to modify any other provisions of the contract (including, but not limited to, the article entitled Allowable Costs, Base Fee and Award Fee and the provisions of the article entitled Statement of Work pertaining to the furnishing of certain services necessary for the work hereunder by Zia) nor shall it create rights or obligations not otherwise provided for in the contract.

IN WITNESS WHEREOF, the parties hereto have executed this Supplemental Agreement in several counterparts.

UNITED STATES OF AMERICA

By: ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

Date: 7/21/77

By: /s/ Herman E. Roser
HERMAN E. ROSER
Manager
Albuquerque Operations Office
Contracting Officer

LOS ALAMOS CONSTRUCTORS, INC.

Date: Jul. 21, 1977

By: /s/ Illegible

Title: President

MEMO FROM JOHN McNETT
TO CHARLES ROSS, JR.
4/26/77, EXH. 11 to
DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT
(R.III)

April 26, 1977

Note to C. T. Ross, Jr., General Attorney,
Sandia Corporation

Charlie:

As I indicated in our recent discussion, the addition of "agency" language to the contract must be rather carefully considered in order that we not prejudice our case in prior years when such language did not appear in the contract. The language must also be drafted with both the gross receipts issue in mind, as well as the purchases issue.

With these thoughts in mind we have drafted a proposed additional article for the Western contract for your consideration and as a basis for further discussion. The draft is enclosed.

Let me know when you are ready to get together for some further discussion on both approaches.

9/6/77

The date of this note was incorrectly stated as 4/24/77 in my letter to Dan Friedman of 8/26/77. As a result the same error was made in item 8 of defendants' motion to compel discovery.

/s/ John F. McNett

Enclosure:

Draft article

EXHIBIT 13

LETTER FROM JOHN McNETT
TO DANIEL H. FRIEDMAN,
8/26/77, EXH. 13 TO
DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT
(R.III)

UNITED STATES ENERGY RESEARCH
AND DEVELOPMENT ADMINISTRATION
Albuquerque Operations Office
P.O. Box 5400
Albuquerque, New Mexico 87115

Aug. 26, 1977

Mr. Daniel H. Friedman
Attorney, Legal Division
Bureau of Revenue
State of New Mexico
Santa Fe, New Mexico 87503

UNITED STATES V. *STATE OF NEW MEXICO ET AL.*—CIVIL ACTION NO. 75-418M

Dear Dan:

This will confirm our discussions of August 23 and 24 concerning the answers to interrogatories served on defendants on August 22, 1977.

Since our answers were prepared, we have located an additional earlier draft of the modification to the Western contract. To account for this draft and a related note from ERDA to Sandia counsel, the chronological narrative should be revised by inserting the following sentence after the first sentence of the first full paragraph on page 7:

> "A subsequent revision of the initial rough draft was sent to Mr. Charles T. Ross by informal note from Leonard A. Jacobvitz dated April 24, 1977,

suggesting discussion of the draft by ERDA and Sandia counsel."

In addition, the last sentence of the first full paragraph on page 7 should be revised by inserting at the beginning the words: "Except for the draft attached to the Jacobvitz/Ross note of April 24, ..."

You indicated some concern with our answer to interrogatory 132. Our answer is intended to convey the idea that we gave no consideration to "designating" the contractors agents, as opposed to "recognizing" their existing agent status. To remove any doubt in this regard, please consider our answer amended by the addition of the following sentence at the end:

> 'No consideration was given by anyone at any time to 'formally and directly designating the contractors as agents for various purposes in the contract modifications.' "

You raised a question not specifically covered by your interrogatories concerning the statement in paragraph 3 of each of the modifications that the contractor "is authorized to pledge the credit of the United States" in all transactions. The use of the word "is" was not intended to imply that these are words of present authorization. This authority is no different from any other authority and status mentioned in the modifications—i.e., it is authority which the contractors have had all along and continue to have.

Sincerely,

/s/ John F. McNett
JOHN F. MCNETT
Assistant Chief Counsel

OGC:JFM

cc: Mr. John J. McCarthy, Chief
Civil Trial Section, Central Division
Tax Division
Room 3101, Old Star Building
U.S. Department of Justice
Washington, D.C. 20530

EXHIBIT 12

JOHN McNETT AFFIDAVIT,
9/9/77, EXH. 12 TO
DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT
(R.III)

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW MEXICO

Civil Action No. 75-418M

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF NEW MEXICO; BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; and FRED L. O'CHESKEY, as Commissioner of Revenue of and for the State of New Mexico, and his successors in office, DEFENDANTS

MEMORANDUM OF DISCUSSIONS
FOR IN-CAMERA INSPECTION

The full identification of the persons referred to in this memorandum are, in alphabetical order, as follows:

1. Anthony G. Garretta, Assistant Director for Procurement Policy, Division of Procurement, ERDA Headquarters
2. John X. Combo, Chief Counsel, Idaho Operations Office, ERDA
3. Guy H. Cunningham, III, Assistant General Counsel for Litigation, ERDA Headquarters
4. Robert L. Forst, Deputy Assistant General Counsel for Procurement, ERDA Headquarters
5. Sally M. Gerety, Counsel, Los Alamos Area Office, ERDA
6. Richard L. Hames, Chief Counsel, Richland Operations Office, ERDA

7. Charles W. Hill, Chief Counsel, Oak Ridge Operations Office, ERDA

8. W. J. Howard, Executive Vice President, Sandia Corporation

9. Leonard A. Jacobvitz, Chief Counsel, Albuquerque Operations Office, ERDA

10. Hugh D. Leenhouts, Assistant Manager for Logistics, Albuquerque Operations Office, ERDA

11. John J. McCarthy, Chief, Civil Trial Section, Central Division, Tax Division, U.S. Department of Justice

12. John F. McNett, Assistant Chief Counsel, Albuquerque Operations Office, ERDA

13. Herman E. Roser, Manager, Albuquerque Operations Office, ERDA

14. Charles T. Ross, Jr., General Attorney, Sandia Corporation

15. Q. B. San Hamel, Attorney, Sandia Corporation

16. Dr. Morgan Sparks, President, Sandia Corporation

17. Charles E. Stratton, Trial Attorney, Civil Trial Section, Central Division, Tax Division, U.S. Department of Justice

18. W. L. Williamson, Attorney, Sandia Corporation

After I prepared my memorandum to Mr. Roser of March 2, 1977, I discussed it with Mr. Jacobvitz. I suggested that a copy be sent to Mr. Ross so that Sandia could be considering some of the matters discussed in my memorandum in connection with the renewal of the Western contract for the five-year period beginning October 1, 1978. The recommendations of the Albuquerque Operations Office for the five-year renewal of the Western contract were due in ERDA Headquarters in Washington 18 months in advance of the renewal date.

I pointed out to Mr. Jacobvitz that any agency language added to the contract would have to be carefully drafted to be consistent with the position we are taking in the litigation, both with respect to purchases by Sandia and the "gross receipts" or "advanced funding" issues.

Mr. Jacobvitz suggested that I prepare a draft article for Sandia's consideration.

Between the time of the above discussions and April 26, 1977, I worked intermittently on a contract article for the Western contract to express Sandia's "management contractor" role and to express existing agency relationships of Sandia to ERDA. I don't recall discussing my drafting efforts with anyone prior to April 26, 1977. In this drafting effort, I never considered any approach other than one of recognizing and expressing existing ERDA-Sandia roles and relationships. The result of this effort was a draft Article XX entitled "Relationship of the Parties," which was sent by Mr. Jacobvitz to Mr. Ross by informal note of April 26, 1977.

Sometime after April 26, 1977 (I don't recall the exact date), a meeting was held in Mr. Jacobvitz's office, attended by Mr. Ross, Mr. Williamson, Mr. Jacobvitz and me. The meeting was arranged by Mr. Ross and Mr. Jacobvitz for the purpose of discussing the April 26 draft contract article.

I stated that the purpose of the draft article was to express in contract language the position we are taking in the tax litigation on the nature of the relationship between ERDA and a management contractor such as Sandia. I pointed out that all of the principles stated in the draft, and much of the exact wording, were lifted from a 1969 law review article by O. S. Hiestand entitled *The AEC Management Contract Concept*, and that paragraph I was taken from AEC's Ninth Semiannual Report to Congress.

Mr. Ross stated that he agreed that the draft article was an accurate statement of existing relationship but thought that much of the wording was inappropriate for contract language and unnecessary as far as any tax issues were concerned. He suggested that since the purpose of the article was to express existing principal-agent relationships, we should confine ourselves to that subject and not attempt to deal with irrelevant matters

such as "master-servant" and "principal-independent contractor." Mr. Ross said that he thought the article should be confined to those aspects of the agency relationship enumerated in paragraph 3 of the April 26 draft. He pointed out that each of the aspects of agency enumerated in paragraph 3 could be shown to be based upon existing provisions of the ERDA-Western contract or established methods of operation under that contract. Mr. Ross said he would have no objection, and thought Western would not object, to a contract article which merely expressed or implied in the contract and established methods of operation.

It was agreed that I would prepare a revision to the article which would expand upon the agency aspects enumerated in paragraph 3 of the April 26 draft, showing the basis for each in existing contract provisions or methods of operation. I don't recall any detailed discussions of possible impact of the proposed article on other aspects of ERDA-Sandia operations at this meeting, although such subjects, identified elsewhere in this memorandum, may have been mentioned in passing. Nor do I recall any specific discussion of the question of amending the contract now versus waiting for the five-year renewal effective October 1, 1978, although that, too, may have been mentioned.

After the meeting described above, I prepared a revised draft of an Article XX which I believe was entitled "Status and Authority of Sandia Corporation as an Agent of ERDA" and which was very similar in form and content to the May 20, 1977, draft, previously furnished to the court. I believe I discussed this draft (mainly editorial matters) with Mr. Williamson in the course of its preparation. I believe this draft consisted solely of the Article XX without preamble or "whereas" clauses. This draft was delivered to Sandia counsel several days prior to our next meeting, which took place in Mr. Ross' office, I believe on May 12, 1977. Those in attendance were Messrs. Ross, Jacobvitz, McNett, Wil-

liamson, and San Hamel. Prior to this meeting, Sandia counsel had prepared their own draft which made certain minor revisions in my draft previously furnished to them.

We first discussed the variations in the ERDA and Sandia drafts. There were only two variations that I now recall. Sandia had added a paragraph 5 consisting of what is now, in substance, the last sentence of Article II ("This article shall not be construed to modify any other provisions of the contract nor shall it create rights or obligations not otherwise provided for in the contract.") I said I thought this point was clear enough from the lead-in language at the beginning of the article preceding the numbered paragraphs, and, furthermore, that if the article were to be added by modifications, the intent of Sandia's proposed paragraph 5 would be reflected in the "whereas" clauses of the modification.

Sandia counsel agreed, but said they felt this idea should be more clearly expressed in the article itself. Mr. Ross said he believed that Western would be more likely to find the article acceptable if it were clear that no change in the actual relationship of the parties was intended. After short discussion, Mr. Jacobvitz and I agreed, but said we thought the provision should be put in an unnumbered paragraph at the end, rather than as a paragraph 5. Sandia counsel agreed.

It was mentioned that the added sentence would make it clear that ERDA and Sandia would continue to look to their contract to define their respective rights and obligations as between each other and not to, e.g., the *American Jurisprudence* article on the law of agency.

The only other variation in ERDA and Sandia drafts that I now recall was regarding the parenthetical words "including but not limited to vendors, subcontractors, and employees," which appeared after the word "obligees" in paragraph 4. The Sandia draft had deleted those words as unnecessary. Sandia felt that such words could be used by Sandia employees to inject ERDA into mat-

ters which should be resolved between employer and employee. I don't recall any specific examples. It was agreed that the word "employees" could not simply be left out because they, too, were "obligees" within the meaning of paragraph 4, and in fact the largest class of obligees paid out of ERDA funds by Sandia. It was therefore agreed to delete the entire parenthetical phrase.

There was some discussion concerning whether words should be added at the end of the article, in substance, that "nothing herein shall affect the employer-employee relationship between Sandia and its employees." The consensus was that since nothing in the article could reasonably be interpreted to affect such relationships, such words were unnecessary.

There was some discussion of the first sentence of paragraph 3 ("rights, benefits and advantages flowing to Sandia"). Sandia counsel pointed out that under some arrangements (e.g., pension plans and insurance), Sandia acquires benefits for the employees personally. After some discussion, it was agreed that such rights and benefits were not rights "flowing to Sandia" but rights "flowing to the employees" and that there was no inconsistency between such special cases and paragraph 3 as written.

After discussion of these matters, it was agreed that revised drafts should be prepared for the consideration of ERDA and Sandia management. It was agreed that if local ERDA and Sandia management approved, the draft modifications could then be sent to Western and to ERDA Headquarters for approval.

There was some discussion as to whether the article should be placed in the contract by an immediate modification of the contract, or delayed until after the District Court's decision in the litigation. It was recognized that there were advantages and disadvantages to either course of action.

It was recognized that if the article were placed in the contract immediately, it might be viewed as a mere

attempt to "bootstrap" our way into a favorable decision. Or it might also be viewed as weakening our case for prior years unless carefully worded to express an agency relationship which had existed in the past. On the other hand, if we delayed, got an unfavored decision, and then put the article into the contract, it would be viewed as an attempt to get a "second bite at the apple" by forcing state and federal governments into another round of litigation with resulting uncertainties and contingencies over another prolonged period of time. Placing the article in the contract now was seen as a more straight-forward way of dealing with the state and with the court, especially since we intended to make it clear that we were not changing the contract or our position in the litigation, but only incorporating into the contract by express language the agency aspects which we have consistently argued, in this and other litigation, have always been implicit in the contractual relationships and conduct of the parties.

I pointed out that defendants were almost finished with their discovery and that it might not be possible to have the modifications approved and executed in time to be placed in the record and considered in the court's decision. I said if we could have them ready in time it might prolong the present litigation for a few months, since defendants would certainly want to conduct some discovery concerning the modifications. However, I said that, in my opinion, it would shorten the controversy in the long run to have all pertinent agreements before the court in the litigation now pending. I said I thought it was in the interest of ERDA, Sandia, the state, and the court to get all issues resolved, once and for all, and to avoid the possibility of another round of litigation.

(The above subject (present versus delayed modifications) was discussed at other times by the various participants named herein. The above summary covers all of the essential points mentioned in all of these discussions, to the best of my recollection.)

It was agreed that the next draft of the contract article would be prepared by me in the format of a present modification to the existing contract and that ERDA counsel would consult with the Justice Department before making any final decision on whether to modify the contract now or wait until after the court's decision. We discussed the "whereas" clauses briefly. It was suggested by someone—I don't recall who—that the modification contain a "whereas" clause to the effect that it was being executed for the purpose of informing third parties (or words to that effect) concerning the nature of the relationship which the parties themselves have always recognized.

After the above meeting, I prepared another draft of a modification, including preamble and "whereas" clauses. I showed this draft to Mr. Williamson and Mr. Ross. Mr. Ross made only one suggestion, as I recall, which I adopted and which dealt with the manner in which the transition from AEC to ERDA should be approached in the "whereas" clauses. Thereafter, the May 20, 1977 draft was prepared.

The May 20, 1977 draft was distributed to ERDA management for comment with Mr. Jacobvitz's May 23, 1977 memo route slip. Mr. Jacobvitz and I discussed the distribution to ERDA management briefly. We agreed that only the Manager, Deputy Manager, and Assistant Manager for Logistics would probably be interested, but that we should send it to all of the Assistant Managers just in case others might have some concerns that we could not foresee. The only substantive coment on the May 20 draft from ERDA management was made by Mr. Leenhouts, Assistant Manager for Logistics, who wondered if the final sentence of the contract article ("shall not be construed to modify" etc.) did not undo all that had been done by the preceding provisions. In discussions with Mr. Leenhouts on May 23, I explained the intent of the last sentence as developed in our earlier discussions with Sandia counsel. Mr. Leenhouts said he

understood and was satisfied with the modification. I said, however, that his question might be one that would occur to others and that for clarity we should add what is now the first sentence of the final unnumbered paragraph of the article ("The purpose of this article is to recognize and express existing relationships.") He said that he was satisfied with my explanation and left it up to me whether the additional sentence was needed. I concluded that the additional sentence was helpful and called Mr. Ross, who agreed. I incorporated the sentence into a revised draft dated May 23, 1977.

It was the May 23 draft, with the additional sentence (and not the May 20 draft as stated in our answers to interrogatories) which was delivered to a representative of the Western Electric legal staff. (Also, delivery to the Western representative occurred on Monday, May 23, rather than on Friday, May 20, as stated in plaintiff's earlier answers to interrogatories.) Mr. Ross advised me that Mr. Sparks and Mr. Howard had approved the May 23 draft before it was delivered to Western.

Sometime prior to May 23, I had advised Mrs. Gerety, Counsel, Los Alamos Area Office, that the contract article was under discussion with Sandia counsel and that if a contract modification were agreed upon we would want to make appropriate adaptations and execute similar modifications for Zia and LACI. On May 23, I prepared a draft modification for the Zia contract which adapted the Western modification to the Zia situation and sent this draft to Mrs. Gerety on May 24, 1977. She subsequently discussed it with Zia counsel and called me on June 1 or 2 to discuss Zia comments and to make a few of her own.

Mrs. Gerety said that Zia management questioned whether there should be an "effective date" for a modification which has as its purpose the recognition of long-standing relationships. Zia representatives had said that the true "effective date" of this modification was April 1, 1946. I told her the point was well taken and that I

saw no reason to have an effective date in this type of contract document. (I subsequently deleted reference to an effective date from drafts prepared on June 8, 1977. After that, however, in discussions with Mr. Ross an arbitrary "effective date" of July 1, 1977, was agreed upon. It was considered standard ERDA and Western practice to have an effective date for contract modifications and this approach was not considered inconsistent with the recognition of existing and past relationships. Mr. Ross and I agreed that the effective date pertains to modifications themselves, not to relationships expressed therein. The same effective date was put in the Zia and LACI modifications for consistency.)

Mrs. Gerety next asked if paragraph 1 should be revised to reflect that Zia's fee became Zia's money upon payment. I said we obviously intended that Zia should become the owner of its fee, but that we could put appropriate words in paragraph 1 to reflect this fact.

Mrs. Gerety asked if paragraph 3 was intended to cover union agreements. I said that I saw no reason why union agreements should not be included within the scope of paragraph 3 as written. She pointed out that unions had in the past made efforts to bring AEC (ERDA) into labor negotiations and that paragraph 3 might give them additional encouragement in that regard. I replied that I didn't see how the language could force ERDA into labor negotiations if it was ERDA policy to stay out, which I understood that it was. I then related to her our discussions with Sandia counsel concerning a possible disclaimer of any effect on employer-employee relationships and our conclusions that such language was unnecessary and why. I said we would give the matter some further thought in light of her comment. (I subsequently mentioned this comment to Mr. Jacobvitz, but I do not recall that anyone pursued the matter beyond that.)

Mrs. Gerety asked about the possible effect of the modification on ERDA's tort liability. I told her that

in my opinion there was no inconsistency between the proposed modification and ERDA's position in Federal Tort Claims Act litigation and that the possibility of impact on tort litigation was so speculative that it did not provide a valid reason for not executing the proposed modification. My conclusions on the tort liability question were based on an analysis set out below. I cannot now recall that I made all of these points in my discussions with Mrs. Gerety, but I did mention all of them at one time or another in my discussions with various ERDA counsel (i.e., Mrs. Gerety, Mr. Jacobvitz, Mr. Cunningham, and Mr. Forst). I may also have mentioned some of these points to Mr. Ross and Mr. Williamson, although I do not recall that ERDA's tort liability was ever a major subject in any of the discussions between ERDA and Sandia counsel concerning these modifications. My analysis of the tort question was as follows:

1. There is no inconsistency between the concepts of "agent" and "independent contractor." The law is very clear that one can be an "agent" for certain specified purposes (i.e., business transactions) and still be an "independent contractor" for tort purposes. For more detail on this point, I referred Mrs. Gerety and others to plaintiff's answers to defendants' interrogatories 8, 9, 98, and 99 filed February 7, 1977.

2. The modifications were entirely consistent with the position ERDA was taking in this case and in other previous and current tax and tort litigation. The modifications merely reflected the existing "business agent" status of the contractors. They did not negate the "independent contractor" defense for cases in which the Government is sued under the Federal Tort Claims Act on the basis of alleged acts of negligence on the part of employees of the contractors in the conduct of day-to-day operations in which ERDA does not exercise direct control.

3. It was acknowledged that use of the word "agent" might cause some persons, who might not otherwise do

so, to bring unfounded suits under the Federal Tort Claims Act. That possibility was not considered a valid objection to the modifications for the following reasons:

a. An actual increase in tort litigation above the present level attributable solely to the language of the modifications was highly speculative.

b. The trend today is to join the Government in tort litigation involving ERDA management contractors, anyway.

c. The "independent contractor" defense in tort cases is not always effective, as illustrated by a recent decision of the 9th Circuit in *McGarry* v. *United States*, 549 F.2d 587 (1976).

d. Where the plaintiff is an employee of the contractor, ERDA can frequently invoke the "exclusive remedy" protection accorded to employers under workmen's compensation statutes.

e. Even when the Government is not sued, ERDA and Department of Justice attorneys are frequently involved in the defense of tort litigation brought against ERDA management contractors.

f. The Government pays for all judgments and litigation costs resulting from tort suits against its contractors, whether or not the Government is named defendant. More Federal Tort Claims Act suits would *not* mean more costs to the Government.

g. The modifications are, after all, an accurate statement of the existing relationships as conceived by the parties, and if unfounded tort litigation is an unavoidable fallout from "telling it like it is," so be it.

Sometime between June 2 and June 8, I talked to Mr. Ross about the status of the modification at Western. He advised me that it would not appear that there would be a problem at Western, but that an individual who would have to approve the modification was out of the country and would not be returning for a week or so. It was agreed that we would proceed to submit the proposed modification to ERDA Headquarters.

In previous discussions between Mr. Jacobvitz and me, it had been agreed that we did not need to ask ERDA Headquarters to "approve" the modifications since we were not changing the contractual relationships but only causing the contract to reflect existing relationships. It was recognized, however, that we should advise ERDA Headquarters of our proposed action and give them the opportunity to raise any objection they might have. I prepared the June 9, 1977, submittal to the General Counsel on that basis.

I was away from my office on vacation from June 10 through June 24, 1977. When I returned, I read Mr. Forst's memorandum of June 15, 1977 (previously furnished to the court) and called him to see if the discussions referred to therein had taken place. He said they had not but would let me know when they did. I believe he asked me at this time about tort liability and that I reiterated my opinion and some or all of the points outlined above in connection with my discussions with Mrs. Gerety. I also talked to Mr. Cunningham at this time and requested that he try to move things along in ERDA Headquarters so that we could get the modifications executed, if that was to be the decision. I related to Mr. Cunningham my earlier discussions with Mr. Forst.

A few days later, I was advised by Mr. Forst and Mr. Cunningham that they had discussed the modifications with Mr. Ragan. The consensus as related to me was that the modifications were appropriate, but that a few of the Chief Counsels for other operations offices should be consulted before the General Counsel's final approval was given. I understand that Mr. Ragan asked Mr. Forst to obtain the views of Mr. Hill, Mr. Combo, and Mr. Hames.

Mr. Forst later advised me that he had discussed the modifications by telephone with the three Chief Counsels named above, that he had read the modifications to them, and obtained their reactions. As best I can recall, the reactions of the three Chief Counsels as passed on to me

by Mr. Forst were: Mr. Hill thought the modifications were a good idea; Mr. Combo said he had no problem with them; and Mr. Hames wondered if the word "management" as used in paragraph 2 wasn't too vague and whether some more specific wording might be employed in that paragraph.

I later discussed the reaction of Mr. Hames with Mr. Ross. We were unable to come up with a better word than "management" for use in paragraph 2. Mr. Ross and I considered it an accurate description of what Sandia does with ERDA property.

At some point after my return from vacation, I asked Mr. Forst about the reaction of Mr. Carretta to the modifications. Mr. Forst said that Mr. Carretta was on leave, that he had not heard from him in specific reference to the June 9 Jacobvitz/Ragan memorandum, but that he did not believe Mr. Carretta would have any problem with the modifications and that he would defer to the attorneys on whether they should be executed. It was subsequently confirmed that Mr. Carretta's position was as stated by Mr. Forst. Mr. Forst later told me that Mr. Carretta may have discussed the modifications with other persons in the Division of Procurement, including Mr. Thomas Davin, but I do not know the substance of those discussions.

Up to this point, I had not discussed the modifications in any detail with attorneys for the U.S. Department of Justice. At some time during the process, I told Mr. Charles E. Stratton of Justice that the modifications were being considered. He expressed agreement with the approach of expressing existing relationships, but I don't recall that we discussed any particular draft or specific language.

On July 6, 1977, I met with Mr. Cunningham and Mr. John J. McCarthy, Tax Division, U.S. Department of Justice, in Mr. McCarthy's office in Washington to discuss the modifications, and specifically, whether they should be executed immediately or not until after the

District Court decision in the litigation. The advantages and disadvantages of each course of action, as summarized above in connection with discussions of the same subject with Sandia counsel, were considered.

Mr. McCarthy stated his opinion that modifications should be executed now, rather than after the District Court's decision. He said he felt that since ERDA was contending that their management contractors were "agents" for the stated purposes that the contracts, as well as our briefs and arguments in the litigation, should reflect that position. He pointed out that, even with the modifications, it would still be necessary to convince the court of the existence of agency relationships based on other provisions of the contracts and methods of operation. Our calling them agents didn't make them so, any more than our *not* calling them agents meant they were not. He said the only real advantage to the Government in the litigation from the modifications would be to show that, whether the contractors are agents or not, it is at least not contrary to ERDA policy to contend that they are and call them that.

I called Mr. Ross in Albuquerque from Mr. McCarthy's office and related to him the opinion of Mr. McCarthy as stated above. Mr. Ross had told me previously that he was going to be discussing the modification with Western's legal staff in New York and wanted to know the Justice Department's position in connection with those discussions.

Mr. Ross later prepared his letter of July 12, 1977, to Western. Mr. Ross showed me the letter in draft before it was sent. I don't recall that I had any substantive comment other than to express agreement with the letter. I do recall suggesting that he not refer to the Western contract as a "GOCO" (Government-owned-contractor-operated) contract. This is DOD terminology and not applicable to AEC/ERDA. I believe I showed Mr. Ross' draft to Mr. Jacobvitz and that he had no comment.

I recall only one change in the modifications that was made after the June 8 drafts and that was deletion of the words "or shall be used" in the first sentence of paragraph 2. This change was made in discussions with Mr. Ross. It was agreed that Western was not required to use any of its property in performance of the contract and in fact did not, but that there was no reason to *prohibit* use of Western property if Western should, for any reason, want to do so in the future.

As best I recall, all of my subsequent discussions of the modifications with ERDA, ERDA contractor, and Department of Justice personnel concerned the mechanics of getting the modifications executed and filed with the court, and not with the substantive provisions.

Execution of the modifications was completed on July 22. I advised Mr. Friedman of them on the following working day, July 25, 1977, and provided him with copies on July 26, 1977. They were filed with the court on July 28, 1977.

/s/ John F. McNett
JOHN F. MCNETT

September 12, 1977

ROBERT T. SCOTT AFFIDAVIT 3/26/76 W/NINE EXHIBITS (R.II)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 75-418

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF NEW MEXICO; BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; and FRED L. O'CHESKEY, as Commissioner of Revenue of and for the State of New Mexico, and his successors in office, DEFENDANTS

AFFIDAVIT

ROBERT W. SCOTT, being first duly sworn, deposes and says:

1. I have, since February 1975, been Assistant Manager for Administration of the Albuquerque Operations Office (ALO) of the United States Energy Research and Development Administration (ERDA) (formerly the United States Atomic Energy Commission (AEC)). My previous positions with AEC have been the following: Area Manager of the Sandia Area Office, a field office under ALO in Albuquerque, New Mexico, from June 1973, through February 1975; Director of the Budget Division, ALO, from April 1969 through June 1973; and Director of the Finance Division of the Idaho Operations Office in Idaho Falls, Idaho, from July 1959 through April 1969. In my present position as Assistant Manager for Administration I have responsibility for ERDA activity related to the providing of ERDA funds for the use of ERDA operating contractors, including Sandia Corporation under Contract AT(29-1)-789 (Contract 789), the Zia Company (Zia) under Contract W-17-028-

ROBERT T. SCOTT AFFIDAVIT 3/26/76
W/NINE EXHIBITS (R.II)

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1. I have, since February 1975, been Assistant Manager for Administration of the Albuquerque Operations Office (ALO) of the United States Energy Research and Development Administration (ERDA) (formerly the United States Atomic Energy Commission (AEC)). My previous positions with AEC have been the following: Area Manager of the Sandia Area Office, a field office under ALO in Albuquerque, New Mexico, from June 1973, through February 1975; Director of the Budget Division, ALO, from April 1969 through June 1973; and Director of the Finance Division of the Idaho Operations Office in Idaho Falls, Idaho, from July 1959 through April 1969. In my present position as Assistant Manager for Administration I have responsibility for ERDA activity related to the providing of ERDA funds for the use of ERDA operating contractors, including Sandia Corporation under Contract AT(29-1)-789 (Contract 789), the Zia Company (Zia) under Contract W-17-028-

ENG-90 (Contract ENG-90), and Los Alamos Constructors, Inc. (LACI) under Contract AT(29-1)-1357 (Contract 1357). ERDA funds are provided for the operations of these contractors through arrangements commonly referred to as "advanced funding."

2. Through the advanced funding arrangements funds are provided from the United States Treasury, through the Federal Reserve bank, for operations under Contract ENG-90 with Zia, Contract 1357 with LACI, and Contract 789 with Sandia Corporation in the following manner:

a. An account is established at a bank approved by ERDA pursuant to a three-party agreement signed by ERDA, the bank of deposit, and the contractor. Attached hereto as exhibits are bank account agreements currently in effect for the funding operations of Zia under Contract ENG-90 (Exhibit 1), of LACI under Contract 1357 (Exhibit 2), and of Sandia Corporation under Contract 789 (Exhibit 3). Other bank account agreements in effect for these contractors are in the same format and contain the same essential provisions as Exhibits 1, 2, and 3.

b. In accordance with the contracts and the bank account agreements, ERDA is the owner of any balance which may exist in any such account. Zia, LACI, and Sandia Corporation never acquire any right, title or interest in or to any balance which may exist in any such account, other than the right and obligation to make expenditures therefrom for contract operations as provided in their respective contracts.

c. ERDA funds are made available for contract operations under Contract 789 in the following manner: Sandia Corporation prepares and executes a payment voucher. Form TUS 5401, in an amount sufficient to cover drafts drawn on the ERDA bank account during a selected period of time (usually one day) and submits it to the bank of deposit. The bank of deposit credits the ERDA special bank account in the amount shown

on the Form TUS 5401 and forwards the form to the appropriate Federal Reserve bank. The Federal Reserve bank credits the account of the bank of deposit in the amount shown on the Form TUS 5401. A sample of an executed Form TUS 5401 used for this purpose is attached hereto as Exhibit 4. A letter of Credit (Standard Form 1193) issued by ERDA in favor of Sandia Laboratories for deposit to the ERDA bank account is the authority of the Federal Reserve bank to provide funds from the account of the United States Treasury to the credit of the bank of deposit upon receipt of the executed Form TUS 5401. A copy of the Letter of Credit issued by ERDA for this purpose is attached hereto as Exhibit 5.

d. ERDA funds are made available for contract operations under Contract ENG-90 and Contract 1357 in the same manner as described in c. above except that the payment voucher, Form TUS 5401, is prepared and executed by the bank of deposit in appropriate amounts as the drafts drawn by Zia and LACI are presented to the bank of deposit for payment. Attached hereto as exhibits are samples of executed Forms TUS 5401 used for funding the operations of Zia (Exhibit 6) and LACI (Exhibit 7). Also attached are copies of the Letter of Credit (Standard Form 1193) authorizing the Federal Reserve bank to provide funds from the account of the United States Treasury to fund the operations of Zia (Exhibit 8) and LACI (Exhibit 9).

3. All valid obligations incurred by Sandia Corporation, by Zia, and by LACI in performance of their respective ERDA contracts, and in accordance with the terms of the contracts, are treated as ERDA liabilities. ERDA can, and occasionally does, elect to make payment directly to obligees on account of liabilities incurred in contract operations as an alternative to having payment made by the ERDA contractor through the advanced funding system described above.

4. The advanced funding method described in this affidavit is routinely used throughout ERDA, with minor variations, for funding the operations of ERDA facilities by ERDA management contractors. Standard contract language for this purpose was prescribed by AEC Procurement Regulations, 41 CFR § 9-7.5006-23 and 24 (reissued as ERDA Procurement Regulations in 40 Fed. Reg., Number 195, October 7, 1975). The prescribed contract language is used, with minor variations, in the Zia and LACI contracts. The system described in the cited CFR provisions (except for the payment of a fee to the contractor) is also used under the Sandia contract. The ERDA advanced funding system as described in this affidavit and applicable CFR provisions is used without regard to tax consequences. The system simplifies the financial aspects of ERDA research, development and production functions. By providing all of the funds necessary to sustain operations under management contracts, ERDA is able to obtain firms willing to perform ERDA functions for no fee or for a very low fee. The system precludes the need for costly borrowing by private firms and eliminates the substantial risks typically imposed on ordinary cost-plus-fixed-fee contractors of the Government.

/s/ Robert W. Scott
ROBERT W. SCOTT

SUBSCRIBED AND SWORN TO before me this 26th day of March.

/s/ Elizabeth R. Gallegos
ELIZABETH R. GALLEGOS
Notary Public

My Commission Expires
February 27, 1977

EXHIBIT 1

SPECIAL BANK ACCOUNT AGREEMENT 9/6/72 BETWEEN ERDA & ZIA AND THE FIRST NATIONAL BANK OF SANTA FE

APPENDIX C

SPECIAL BANK ACCOUNT AGREEMENT

Agreement entered into this 6th day of September 1972, between the United States of America (hereinafter called the "Government"), represented herein by the United States Atomic Energy Commission (hereinafter called the "Commission"), The Zia Company (hereinafter called "Contractor"), a corporation organized under the laws of the State of New Mexico, and the First National Bank of Santa Fe, a national banking corporation located at Santa Fe, New Mexico, acting through its Los Alamos Branch (hereinafter called the "Bank"), located at Los Alamos, New Mexico,

WITNESSETH THAT:

WHEREAS, on July 1, 1967, the Commission, the Contractor and the Bank entered into a Special Bank Account Agreement regarding the Contractor's General Account and Payroll Account with the Bank, which Agreement has been in force until this date; and

WHEREAS, the parties hereto desire and intend that said Agreement shall be superseded by this Special Bank Account Agreement; and

WHEREAS, under effective date of July 1, 1970, the Commission and the Contractor entered into Modification No. 52 to Contract No. W-17-028-Eng-90 providing for continued advances of Government funds to the Con-

tractor, copy of such advance provisions having been furnished to the Bank; and

* * * * *

WHEREAS, the Commission requires that amounts advanced to the Contractor under said contract or modification be deposited in Special Bank Accounts with a bank designated by the Treasury Department as a depositary and financial agent of the Government (Section 10 of the Act of June 11, 1942, 56 Stat. 356; 12 U.S.C. 265), separate from any of the Contractor's general or other funds; and, the Bank being such a bank, the parties agree to deposit said amounts with the Bank.

NOW THEREFORE, in consideration of the foregoing, and for other good and valuable considerations, it is agreed that:

1. The said Special Bank Accounts shall be designated "The Zia Company, Contract No. W-17-028-Eng-90, United States Atomic Energy Commission Special General Bank Account" and "The Zia Company, Contract No. W-17-028-Eng-90, United States Atomic Energy Commission Special Payroll Bank Account."

2. The Government shall have title to the credit balance in said accounts to secure the return of all advances made to the Contractor, which title shall be superior to any lien or claim of the Bank or others with respect to such accounts.

3. The Bank will be bound by the provisions of said contract relating to the deposit and withdrawal of funds in the above Special Bank Accounts, but shall not be responsible for the application of funds properly withdrawn from said Accounts. After receipt by the Bank of written directions from the Contracting Officer, or from the duly authorized representative of the Contracting Officer or the Manager of the Albuquerque Operations Office of the Commission, the Bank

shall act thereon and shall be under no liability to any party hereto for any action taken in accordance with the said written directions.

4. The Government, or its authorized representatives, shall have access to the books and records maintained by the Bank with respect to such Special Bank Accounts at all reasonable times and for all reasonable purposes, including, without limitation, the inspection or copying of such books and records and any and all memoranda, checks, correspondence or documents appertaining thereto. Except as agreed upon by the Government and the Bank, all books and records pertaining to the Special Bank Accounts in the possession of the Bank relating to the Special Bank Account Agreement shall be preserved by the Bank for a period of three (3) years after final payment under the contract to which the Special Bank Account Agreement pertains or otherwise disposed of in such manner as may be agreed upon by the Government and the Bank.

5. In the event of the service of any writ of attachment, levy of execution, or commencement of garnishment proceedings with respect to the Special Bank Accounts, the Bank will promptly notify the Manager, Los Alamos Area Office, Atomic Energy Commission.

6. The "Equal Opportunity" clause set forth in Federal Procurement Regulations Section 1-12.803-2 is hereby incorporated into this Agreement by reference and applies as fully as if set forth completely herein. "Contractor" as used in said clause shall mean the Bank.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed as of day and year first above written.

UNITED STATES ATOMIC ENERGY COMMISSION

By: /s/ Charles C. Campbell
CHARLES C. CAMPBELL

TITLE: Assistant Manager for Logistics
Albuquerque Operations, USAEC

THE ZIA COMPANY

By: /s/ W. L. Miller
TITLE: Manager

FIRST NATIONAL BANK OF SANTA FE
LOS ALAMOS BRANCH

By: /s/ Howard Irwin
TITLE: Vice President

EXHIBIT 2

SPECIAL BANK ACCOUNT AGREEMENT 7/1/67 BETWEEN AEC, LOS ALAMOS CONTRACTORS, INC. & LOS ALAMOS NATIONAL BANK

SPECIAL BANK ACCOUNT AGREEMENT

Agreement entered into this 1st day of July 1967, between the United States of America (hereinafter called the "Government"), represented herein by the United States Atomic Energy Commission (hereinafter called the "Commission"), Los Alamos Constructors, Inc. (hereinafter called the "Contractor"), a corporation organized under the laws of the State of New Mexico, and Los Alamos National Bank, a banking corporation under the laws of the United States of America (hereinafter called the "Bank"), located at Los Alamos, New Mexico,

WITNESSETH THAT:

WHEREAS, on April 20, 1962, the Commission, the Contractor and the Bank entered into a Special Bank Account Agreement regarding the Contractor's General Account and Payroll Account with the Bank, which Agreement has been in force until this date; and

WHEREAS, the parties hereto desire and intend that said Agreement shall be superseded by this Special Bank Account Agreement; and

WHEREAS, under effective date of July 1, 1967, the Commission and the Contractor entered into Modification No. 39 to Contract No. AT(29-1)-1357 providing for continued advances of Government funds to the Contractor, copy of such advance provisions having been furnished to the Bank; and

WHEREAS, the Commission requires that amounts advanced to the Contractor under said contract or modifi-

cation be deposited in Special Bank Accounts with a bank designated by the Treasury Department as a depositary and financial agent of the Government (Section 10 of the Act of June 11, 1942, 56 Stat. 356; 12 U.S.C. 265), separate from any of the Contractor's general or other funds; and, the Bank being such a bank, the parties agree to deposit said amounts with the Bank.

NOW THEREFORE, in consideration of the foregoing, and for other good and valuable considerations, it is agreed that:

1. The said Special Bank Accounts shall be designated "Los Alamos Constructors, Inc., Contract No. AT(29-1)-1357, United States Atomic Energy Commission Special General Bank Account" and "Los Alamos Constructors, Inc., Contract No. AT(29-1)-1357, United States Atomic Energy Commission Special Payroll Bank Account."

2. The Government shall have title to the credit balance in said accounts to secure the return of all advances made to the Contractor, which title shall be superior to any lien or claim of the Bank or others with respect to such accounts.

3. The Bank will be bound by the provisions of said contract relating to the deposit and withdrawal of funds in the above Special Bank Accounts, but shall not be responsible for the application of funds properly withdrawn from said Accounts. After receipt by the Bank of written directions from the Contracting Officer, or from the duly authorized representative of the Contracting Officer or the Manager of the Albuquerque Operations Office of the Commission, the Bank shall act thereon and shall be under no liability to any party thereto for any action taken in accordance with the said written directions.

4. The Government, or its authorized representatives, shall have access to the books and records maintained

by the Bank with respect to such Special Bank Accounts at all reasonable times and for all reasonable purposes, including, without limitation, the inspection or copying of such books and records and any and all memoranda, checks, correspondence or documents appertaining thereto. Except as agreed upon by the Government and the Bank, all books and records pertaining to the Special Bank Accounts in the possession of the Bank relating to the Special Bank Account Agreement shall be preserved by the Bank for a period of three (3) years after final payment under the contract to which the Special Bank Account Agreement pertains or otherwise disposed of in such manner as may be agreed upon by the Government and the Bank.

5. In the event of the service of any writ of attachment, levy of execution, or commencement of garnishment proceedings with respect to the Special Bank Accounts, the Bank will promptly notify the Manager, Los Alamos Area Office, Atomic Energy Commission.

• • • • •

EXHIBIT 3

LETTER AGREEMENT RE: SPECIAL BANK ACCOUNT 10/28/49 BETWEEN AEC, THE SANDIA CORP. AND THE ALBUQUERQUE NATIONAL BANK

October 28, 1949

Albuquerque National Bank
Albuquerque, New Mexico

Gentlemen,

It is proposed to open an account in your bank under the name "SANDIA CORPORATION, AEC ADVANCED FUNDS UNDER CONTRACT NO. AT-(29-1)-789", which shall be subject to the following terms and conditions:

1. The funds deposited therein shall at all times be the property of the Atomic Energy Commission. Sandia Corporation shall acquire no property right, title or interest in or to such funds other than the right to make expenditures therefrom for the purpose of paying costs of performing the work under said Contract.

2. Your Bank shall be under no liability to the Commission or Sandia Corporation for the withdrawal of any funds from said account by properly endorsed checks either signed by a representative of Sandia Corporation or, if in amounts up to $1,000.00, bearing a facsimile signature of such representative, certified in either case to be so authorized, under the seal of Sandia Corporation.

3. The Commission shall have the right to inspect the books and records of your Bank relating to the account or to request and receive from your Bank any information concerning the account.

4. Your Bank shall, when directed by the Commission, discontinue honoring checks thereafter drawn on the account by Sandia Corporation. The Commission may also direct your Bank to return the Commision all or any portion of the balance then in the account, provided that

your Bank will return such funds to the Commission only by means of a check made payable to the Treasurer of the United States.

5. When your Bank receives directions of the character specified above written on Atomic Energy Commission stationery which appear to have been signed by or at the direction of, or under the authority of the Commission, such directions shall be deemed to have been properly issued by the Commission and your bank shall follow such directions and shall be under no liability to Sandia Corporation for so doing.

6. To secure the funds deposited in said account, your Bank will keep U.S. Bonds on deposit with a Federal Reserve Bank or the U.S. Treasury at all times equal in value to the balance in the account. Such Bonds shall be deposited under a Joint Custody Receipt naming your Bank and the Atomic Energy Commission. Your Bank and the Commission will agree upon procedures to be followed in event it becomes appropriate to increase or decrease the number of bonds deposited by your Bank or to substitute other bonds for the bonds then on deposit.

If the arrangement set forth above and approved by the Atomic Energy Commission is acceptable to you, please return the four attached copies of this letter after so indicating in the space provided below.

SANDIA CORPORATION

By /s/ George A. Landry
GEORGE A. LANDRY
President

APPROVED:

ATOMIC ENERGY COMMISSION

By /s/ C. L. Tyler
CARROLL L. TYLER
Manager
Santa Fe Operations Office

The undersigned Bank has received a copy of this agreement and agrees to handle all funds deposited in said account by Sandia Corporation as above provided.

ALBUQUERQUE NATIONAL BANK

By /s/ C. E. Dinkle
Vice Pres.

Payment Voucher on Letter of Credit No. 89-00-1303

...a 5401-S
(Rev. 12-67)
Dept. of the Treasury
6 TFRM 1000

PAYMENT VOUCHER ON LETTER OF CREDIT
(TO BE COLLECTED AS A NON-CASH ITEM)
The drawer's bank shall be the agent of the drawer for the collection of this instrument and each subsequent collecting commercial bank shall be the subagent of the drawer.

2050505
SERIAL NO.
SYMBOL 17-865

VOUCHER NO.	LETTER OF CREDIT NO.	AGENCY STATION SYMBOL	DATE VOUCHER DRAWN	AMOUNT
3906	89-00-1303	89-00-9713	November 26, 1975	$ 35,000.00

NAME AND ADDRESS OF DRAWER	NAME AND ADDRESS OF DRAWER'S BANK	FEDERAL RESERVE BANK OR BRANCH
Sandia Corporation P. O. Box 5800 Albuquerque, New Mexico	Albuquerque National Bank P. O. Box 1344 Albuquerque, New Mexico	Denver Branch

NAME AND ADDRESS OF U. S. AGENCY
U. S. ERDA
Albuquerque Operations Office
P. O. Box 5400
Albuquerque, New Mexico 87115

I certify that this payment voucher has been drawn in accordance with the terms and conditions of the letter of credit cited and that the amount for which drawn is properly for credit to the account of the drawer at the drawer's bank.

M. J. Snyder — Cashier
(Countersignature) (Title)

Per authorization of Fiscal Assistant Secretary, Treasury Department debit the general account of the Treasurer of the U. S. and pay to the presenting bank the amount shown above.

FOR FEDERAL RESERVE BANK USE ONLY
NOV 28 1975
(Date Debited) (Authorized Signature)

Government agency.

Exhibit 4

Standard Form 1193
8 TREASURY FRM 1000
Fiscal Service, Bureau of Accounts

ISSUING AGENCY	LETTER OF CREDIT	LETTER OF CREDIT NUMBER
U.S. ENERGY RES. & DEVEL. ADMIN. ALBUQUERQUE OPERATIONS OFFICE P.O. BOX 5400 ALBUQUERQUE, NEW MEXICO 87115	Auth: TREASURY DEPARTMENT CIRCULAR No. 1075, Revised	89-00-1303 AMENDMENT NUMBER 20
AGENCY STATION SYMBOL 89-00-9713	(FOR AGENCY USE)	EFFECTIVE DATE DECEMBER 2, 1975

To: The Federal Reserve Bank,	BRANCH BANK AT
KANSAS CITY, MISSOURI	DENVER, COLORADO

Letter of Credit No. 89-00-1303

In accordance with the authorization of the Fiscal Assistant Secretary, Treasury Department, there is hereby authorized for the account and responsibility of the issuing agency a letter of credit:

IN FAVOR OF	FOR DEPOSIT ONLY TO
SANDIA LABORATORIES ALBUQUERQUE, NEW MEXICO ERDA ADVANCED FUNDS UNDER CONTRACT AT(29-1)-789	ALBUQUERQUE NATIONAL BANK ALBUQUERQUE, NEW MEXICO, AND FIRST NATIONAL BANK ALBUQUERQUE, NEW MEXICO ACCOUNT

AMOUNT AUTHORIZED		PRIOR AUTHORIZATION	THIS CHANGE
$ 2,312,503,121.96	☐ EACH MONTH ☐ EACH QUARTER ☒ WITHOUT TIME LIMIT ☐ _____	$ 2,223,470,121.96	Increase $ 89,033,000.00 Decrease $

☒ The unpaid balance of this letter of credit will remain available until you are advised in writing by the Treasury Department that this letter has been revoked.*

OR

☐ The unpaid balance of this letter of credit is revoked at the end of each period indicated and the full amount reestablished at the beginning of the following period until you are advised in writing by the Treasury Department that this letter has been revoked.

The amount of this letter of credit is hereby certified to be drawn against, upon presentation to you of Form TUS 5401, Payment Voucher on Letter of Credit, by the official(s) of the recipient organization whose signature(s) appear(s) on the Standard Form 1194, Authorized Signature Card for Payment Vouchers on Letter of Credit, attached hereto or previously or subsequently furnished you through the Treasury Department.

The amount of each payment voucher paid by a Federal Reserve Bank or branch to a designated commercial bank for credit to the account of the recipient organization shall constitute payment to the recipient organization by the United States.

I certify to the Treasury Department that the payments authorized herein are correct and proper for payment from the appropriations or funds legally committed and available for the purpose, when paid in accordance with the terms and conditions cited above.

*THIS LETTER OF CREDIT IS IRREVOCABLE TO THE EXTENT THE RECIPIENT ORGANIZATION HAS OBLIGATED FUNDS IN GOOD FAITH THEREUNDER IN EXECUTING THE AUTHORIZED FEDERAL PROGRAM IN ACCORDANCE WITH THE GRANT, CONTRACT, OR OTHER AGREEMENT.

DATE CERTIFIED November 17, 1975

AUTHORIZED CERTIFYING OFFICER

ALFONSO SALAS, CHIEF
REPORTS & ACCTNG ACCOUNTING SECTION

TYPED NAME AND TITLE

☆ GPO: 1968—312-659

1193-102

Exhibit 5

Payment Voucher on Letter
of Credit No. 89-00-1316

FORM TUS 5401
(Rev. 12-67)
Dept. of the Treasury
6 TFRM 1000

PAYMENT VOUCHER ON LETTER OF CREDIT
(TO BE COLLECTED AS A NON-CASH ITEM)

The drawer's bank shall be the agent of the drawer for the collection of this instrument and each subsequent collecting commercial bank shall be the subagent of the drawer.

1858966
SERIAL NO.

SYMBOL 17-865

VOUCHER NO.	LETTER OF CREDIT NO.	AGENCY STATION SYMBOL	DATE VOUCHER DRAWN	AMOUNT
1115	89-00-1316	89-00-9713	11-28-75	$ 133,097.40

NAME AND ADDRESS OF DRAWER	NAME AND ADDRESS OF DRAWER'S BANK	FEDERAL RESERVE BANK OR BRANCH
1st Natl Bk of Santa Fe Los Alamos Branch Los Alamos New Mexico	1st Natl Bank of Santa Fe Los Alamos Branch Los Alamos New Mexico	Denver Branch Federal Reserve Bank of Kansas City Missouri .

NAME AND ADDRESS OF U.S. AGENCY

U.S. E.D.A.
Albuquerque Operations Office
P.O. Box 5400
Albuquerque New Mexico 87115

I certify that this payment voucher has been drawn in accordance with the terms and conditions of the letter of credit cited and that the amount for which drawn is properly for credit to the account of the drawer at the drawer's bank.

[signature] — (SIGNATURE)
Operations Officer — (TITLE)

(COUNTERSIGNATURE) — (TITLE)

Per authorization of Fiscal Assistant Secretary, Treasury Department, debit the general account of the Treasurer of the U. S. and pay to the presenting bank the amount shown above.

FOR FEDERAL RESERVE BANK USE ONLY

NOV 28 1975 (DATE DEBITED) — (AUTHORIZED SIGNATURE)

Exhibit 6

Payment Voucher on Letter of Credit No. 89-00-1317

FORM TUS 5401 (Rev. 12-67) Dept. of the Treasury 6 TFRM 1000

PAYMENT VOUCHER ON LETTER OF CREDIT
(TO BE COLLECTED AS A NON-CASH ITEM)
The drawer's bank shall be the agent of the drawer for the collection of this instrument and each subsequent collecting commercial bank shall be the subagent of the drawer.

1858982
SERIAL NO.
SYMBOL 17-865

VOUCHER NO.	LETTER OF CREDIT NO.	AGENCY STATION SYMBOL	DATE VOUCHER DRAWN	AMOUNT
665	89-00-1317	89-00-9713	5 DEC 75	$ 17,409.28

NAME AND ADDRESS OF DRAWER	NAME AND ADDRESS OF DRAWER'S BANK	FEDERAL RESERVE BANK OR BRANCH
1st Nat'l Bank of Santa Fe Los Alamos Branch Los Alamos, New Mexico	1st Nat'l Bank of Santa Fe Los Alamos Branch Los Alamos, New Mexico	Denver Branch Federal Reserve Bank of Kansas City, Missouri

NAME AND ADDRESS OF U.S. AGENCY
U.S. E.R.D.A.
Albuquerque Operations Office
P.O. Box 5400
Albuquerque, New Mexico 87115

I certify that this payment voucher has been drawn in accordance with the terms and conditions of the letter of credit cited and that the amount for which drawn is properly for credit to the account of the drawer at the drawer's bank.

(SIGNATURE) Operations Officer (TITLE)

(COUNTERSIGNATURE) (TITLE)

Per authorization of Fiscal Assistant Secretary, Treasury Department, debit the general account of the Treasurer of the U. S. and pay to the presenting bank the amount shown above.

FOR FEDERAL RESERVE BANK USE ONLY

(DATE DEBITED) (AUTHORIZED SIGNATURE)

Exhibit 7

8 TREASURY FRM 1000
Fiscal Service, Bureau of Accounts

ISSUING AGENCY	LETTER OF CREDIT	LETTER OF CREDIT NUMBER
U.S. ERDA ALBUQUERQUE OPERATIONS OFFICE P.O. BOX 5400 ALBUQUERQUE, N. M. 87115	Auth: TREASURY DEPARTMENT CIRCULAR No. 1075, Revised	89-00-1316 AMENDMENT NUMBER 22
AGENCY STATION SYMBOL 89-00-9713	(FOR AGENCY USE)	EFFECTIVE DATE DECEMBER 17, 1975

TO: The Federal Reserve Bank,	BRANCH BANK AT
KANSAS CITY, MISSOURI	DENVER, COLORADO Letter of Credit No 89-00-1316

In accordance with the authorization of the Fiscal Assistant Secretary, Treasury Department, there is hereby authorized for the account and responsibility of the issuing agency a letter of credit:

IN FAVOR OF	FOR DEPOSIT ONLY TO
FIRST NATIONAL BANK OF SANTA FE LOS ALAMOS BRANCH LOS ALAMOS, N.M. 87544	THE ZIA COMPANY CONTRACT W-17-023-ENG-90 U.S. ERDA ACCOUNT

AMOUNT AUTHORIZED		PRIOR AUTHORIZATION	THIS CHANGE
$ 72,413,022.41	☐ EACH MONTH ☐ EACH QUARTER ☒ WITHOUT TIME LIMIT ☐ _____	$ 68,740,311.41	Increase $ 3,672,711.00 Decrease $ -

☒ The unpaid balance of this letter of credit will remain available until you are advised in writing by the Treasury Department that this letter has been revoked.

OR

☐ The unpaid balance of this letter of credit is revoked at the end of each period indicated and the full amount reestablished at the beginning of the following period until you are advised in writing by the Treasury Department that this letter has been revoked.

The amount of this letter of credit is hereby certified to be drawn against, upon presentation to you of Form TUS 5401, Payment Voucher on Letter of Credit, by the official(s) of the recipient organization whose signature(s) appear(s) on the Standard Form 1194, Authorized Signature Card for Payment Vouchers on Letter of Credit, attached hereto or previously or subsequently furnished you through the Treasury Department.

The amount of each payment voucher paid by a Federal Reserve Bank or branch to a designated commercial bank for credit to the account of the recipient organization shall constitute payment to the recipient organization by the United States.

I certify to the Treasury Department that the payments authorized herein are correct and proper for payment from the appropriations or funds legally committed and available for the purpose, when paid in accordance with the terms and conditions cited above.

*THIS LETTER OF CREDIT IS IRREVOCABLE TO THE EXTENT THE RECIPIENT ORGANIZATION HAS OBLIGATED FUNDS IN GOOD FAITH THEREUNDER IN EXECUTING THE AUTHORIZED FEDERAL PROGRAM IN ACCORDANCE WITH THE GRANT, CONTRACT, OR OTHER AGREEMENT.

DATE CERTIFIED DECEMBER 8, 1975

Alfonso Salas
AUTHORIZED CERTIFYING OFFICER
ALFONSO SALAS, CHIEF
REPORTS AND MACHINE ACCOUNTING SECTION
TYPED NAME AND TITLE

☆ GPO: 1968—319-859

Exhibit 8

Standard Form 1193
I TREASURY FRM 1000
Fiscal Service, Bureau of Accounts

ISSUING AGENCY	LETTER OF CREDIT	LETTER OF CREDIT NUMBER
U.S. ERDA ALBUQUERQUE OPERATIONS OFFICE P.O. BOX 5400 ALBUQUERQUE, NM 87115	Auth: TREASURY DEPARTMENT CIRCULAR No. 1075, Revised	89-00-1317 AMENDMENT NUMBER 16
AGENCY STATION SYMBOL 89-00-9713	(FOR AGENCY USE)	EFFECTIVE DATE DECEMBER 22, 1975

To: The Federal Reserve Bank,	BRANCH BANK AT
KANSAS CITY, MISSOURI	DENVER, COLORADO Letter of Credit No. 89-00-1317

In accordance with the authorization of the Fiscal Assistant Secretary, Treasury Department, there is hereby authorized for the account and responsibility of the issuing agency a letter of credit:

IN FAVOR OF	FOR DEPOSIT ONLY TO
FIRST NATIONAL BANK OF SANTA FE LOS ALAMOS BRANCH LOS ALAMOS, NM 87544	LOS ALAMOS CONSTRUCTORS, INC. CONTRACT AT(29-1)-1357 U.S. ENERGY RES. & DEVEL. ADMIN. ACCOUNT

AMOUNT AUTHORIZED		PRIOR AUTHORIZATION	THIS CHANGE
$ 6,820,285.07	☐ EACH MONTH ☐ EACH QUARTER ☒ WITHOUT TIME LIMIT ☐ _____	$ 6,595,285.07	Increase $225,000.00 Decrease $

☒ The unpaid balance of this letter of credit will remain available until you are advised in writing by the Treasury Department that this letter has been revoked.

OR

☐ The unpaid balance of this letter of credit is revoked at the end of each period indicated and the full amount reestablished at the beginning of the following period until you are advised in writing by the Treasury Department that this letter has been revoked.

The amount of this letter of credit is hereby certified to be drawn against, upon presentation to you of Form TUS 5401, Payment Voucher on Letter of Credit, by the official(s) of the recipient organization whose signature(s) appear(s) on the Standard Form 1194, Authorized Signature Card for Payment Vouchers on Letter of Credit, attached hereto or previously or subsequently furnished you through the Treasury Department.

The amount of each payment voucher paid by a Federal Reserve Bank or branch to a designated commercial bank for credit to the account of the recipient organization shall constitute payment to the recipient organization by the United States.

I certify to the Treasury Department that the payments authorized herein are correct and proper for payment from the appropriations or funds legally committed and available for the purpose, when paid in accordance with the terms and conditions cited above.

"THIS LETTER OF CREDIT IS IRREVOCABLE TO THE EXTENT THE RECIPIENT ORGANIZATION HAS OBLIGATED FUNDS IN GOOD FAITH THEREUNDER IN EXECUTING THE AUTHORIZED FEDERAL PROGRAM IN ACCORDANCE WITH THE GRANT, CONTRACT, OR OTHER AGREEMENT.

DATE CERTIFIED DECEMBER 10, 1975

Alfonso Salas
AUTHORIZED CERTIFYING OFFICER

ALFONSO SALAS, CHIEF
REPORTS & VOUCHER ACCOUNTING SECTION
TYPED NAME AND TITLE

☆ GPO: 1968—319-059

1193-105

Exhibit 9

Ex 17 - Ex. 18

SANDIA CORPORATION
SANDIA BASE
ALBUQUERQUE, NEW MEXICO

TO FIRST NATIONAL BANK IN ALBUQUERQUE
ALBUQUERQUE, NEW MEXICO

95-1
1022

CODE 02 CHECK NO. 41399 DATE 10/15/75 PAY $**755.00 C

(SURNAME FIRST)

08115 OVER $1000* NOT VALID

[NAME DELETED]

SANDIA CORPORATION

CANCELLED

(SURNAME FIRST)

PAYABLE IF DESIRED AT WELLS FARGO LIVER
MORE , CALORNIA, 90-410/

216776 ⑆1022⑈000⑆ 100 000 202⑈

SANDIA CORPORATION
SANDIA BASE
ALBUQUERQUE, NEW MEXICO

TO FIRST NATIONAL BANK IN ALBUQUERQUE
ALBUQUERQUE, NEW MEXICO

95-1
1022

CHECK NO. 73216 DATE 02/03/75 PAY$******38.0

THE OPTICAL PUBLISHING CO INC
LENOX ROAD
PITTSFIELD MA 01201

SANDIA CORPORATION

CANCELLED

MENT OF THE ITEMS LISTED ON THE ACCOMPANYING REMITTANCE ADVICE.

,38359 ⑆1022⑈000⑆ 100 000 202⑈

SANDIA CORPORATION
SANDIA BASE
ALBUQUERQUE, NEW MEXICO

TO ALBUQUERQUE NATIONAL BANK
ALBUQUERQUE, NEW MEXICO

95-8
1022

CODE 02 CHECK NO. 18795 DATE 1/31/75 PAY $***146.70

(SURNAME FIRST)

08256 OVER $500** NOT VALID

[NAME DELETED]

SANDIA CORPORATION

CANCELLED

(SURNAME FIRST)

PAYABLE IF DESIRED AT WELLS FARGO BANK
LIVERMORE, CALIFORNIA, 90-410

192015 :1022=0008: 00 0286 0

SANDIA CORPORATION
SANDIA BASE
ALBUQUERQUE, NEW MEXICO

TO ALBUQUERQUE NATIONAL BANK
ALBUQUERQUE, NEW MEXICO

95-8
1022

CHECK NO. 71288 DATE 02/13/75 PAY$ *****120.00

PLENUM PUBL CO
227 WEST 17TH ST
NEW YORK NY 10011

SANDIA CORPORATION

CANCELLED

YMENT OF THE ITEMS LISTED ON THE ACCOMPANYING REMITTANCE ADVICE.

LOS ALAMOS CONSTRUCTORS, INC.
GENERAL ACCOUNT
LOS ALAMOS, NEW MEXICO 87544

Ex. 19

1-3 1975

95-191
1022

REGISTERED RD-246 2902 DOLLARS 77 CTS

PAY DOLLARS $ 2,902.77

TO THE ORDER OF

The First National Bank of Santa Fe
Los Alamos Branch

Void

LOS ALAMOS CONSTRUCTORS, INC.

C. D. Tyson

B. W. Bean

LOS ALAMOS BRANCH
THE FIRST NATIONAL BANK OF SANTA FE LOS ALAMOS, NEW MEXICO
THE OLDEST BANK IN THE SOUTHWEST

⑈1022⑈0191⑈ 59 0012 3⑈ ⑈0000290277⑈

t 116

ZIA

THE ZIA COMPANY, LOS ALAMOS, NEW MEXICO 095788

AEC ADVANCED FUNDS

95-191
1022

JUN 26 1975

REGISTERED RD-246 289 DOLLARS 60 CTS

AMOUNT
$ 289.60

THE ZIA COMPANY

NOT TO EXCEED $1,000.

Void

PAY TO THE ORDER OF

C. W. Ketchell

FIRST NATIONAL BANK OF SANTA FE
LOS ALAMOS BRANCH
LOS ALAMOS, NEW MEXICO

⑈1022⑈0191⑈ 59 0006 9⑈ ⑈0000028960

E.C. ADVANCED FUNDS
PAYROLL ACCOUNT
NOT TO EXCEED $500

PAY TO THE ORDER OF

[NAME DELETED]

2-2 C4561

IRONS OR ERASURES OF NAME
OUNT INVALIDATES THIS CHECK
AUD UNLESS CASHED WITHIN 90 DAYS

FIRST NATIONAL BANK OF SANTA FE
LOS ALAMOS BRANCH
LOS ALAMOS, NEW MEXICO

⑈250648⑈

09 THE ZIA COMPANY
LOS ALAMOS, NEW MEXICO

Void

08 31 75 623

$119.97

*117 DOLLARS .97 CENTS

THE ZIA COMPANY

L. D. Tyson

P. L. Miller

⑆1070⑈0044⑆ 59 0007 7⑈ ⑈0000011997

66

EX.20

EX.20

Sandia Laboratories
Albuquerque, New Mexico 87115
OPERATED BY SANDIA CORPORATION
for
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
ADVANCE FUNDS ACCOUNT - CONTRACT (29-1)-789

TO FIRST NATIONAL BANK IN ALBUQUERQUE
ALBUQUERQUE, NEW MEXICO

95-27
1070

CODE CHECK NO. DATE / /

PAY $

(SURNAME FIRST)

OVER $_____ NOT VALID

SANDIA CORPORATION

CANCELLED

SA 9424-EF(3-78)

0002 ⑈1070⑈002 7⑈ 100 000 20 2⑈

Sandia Laboratories
Albuquerque, New Mexico 87115
OPERATED BY SANDIA CORPORATION
for
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
ADVANCE FUNDS ACCOUNT - CONTRACT (29-1)-789

TO FIRST NATIONAL BANK IN ALBUQUERQUE
ALBUQUERQUE, NEW MEXICO

95-27
1070

CHECK NO. DATE / /

PAY $

SANDIA CORPORATION

CANCELLED

MENT OF THE ITEMS LISTED ON THE ACCOMPANYING REMITTANCE ADVICE

SA 9424-A2(

0002 ⑈1070⑈002 7⑈ 100 000 20 2⑈

Sandia Laboratories
Albuquerque, New Mexico 87115
OPERATED BY SANDIA CORPORATION
for
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
ADVANCE FUNDS ACCOUNT - CONTRACT (29-1)-789

TO ALBUQUERQUE NATIONAL BANK
ALBUQUERQUE, NEW MEXICO

95-32
1070

CODE CHECK NO. DATE / /

PAY $

(SURNAME FIRST)

OVER $_____ NOT VALID

SANDIA CORPORATION

CANCELLED

SA9424-EA(3-78)

0002 ⑈1070⑈002 7⑈ 100 000 20 2⑈

EX. 21

TAB STOP TAB STOP

THE ZIA COMPA Y, LOS ALAMOS, NEW MEXICO 16949

C TRACT W-17-025-ENG-90
U.S. ENERGY RESI RCH AND DEVELOPMENT ADMINISTRATION
DVANCE FUNDS ACCOUNT

THE FIRST NATIONAL BANK OF SANTA FE 93-87
LOS ALAMOS BRANCH 1070
LOS ALAMOS, NEW MEXICO

AMOUNT
$

Y
THE
DER OF: Void

THE ZIA COMPANY

BY: Void

BY:

⑆1070⑈0083⑆ 59 0006 9⑈

ZIA COMPANY, LOS ALAMOS, NEW MEXICO
CONTRACT W - 17 - 025 - ENG - 90
ERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
ADVANCE FUNDS ACCOUNT

PAY TO THE
ORDER OF

THE ZIA COMPANY
LOS ALAMOS, NEW MEXICO

Void

*223 DOLLARS .57 CENTS

08 22 76 6716

$223.57

THE ZIA COMPANY

-9 81862

ONS OR ERASURES OF NAME
JNT INVALIDATES THIS CHECK
ID UNLESS CASHED WITHIN 90 DAYS

FIRST NATIONAL BANK OF SANTA FE
LOS ALAMOS BRANCH
LOS ALAMOS, NEW MEXICO

⑈312742⑈ ⑆1070⑈0083⑆ 59 0007 7⑈

1002

Plaintiff's Answer to
Defendants' Interrogatory
116 and Exhibits 18-21,
filed August 31, 1976
(R.IV)

116. State all written material contained on checks issued by Zia, LACI, and Sandia to their respective suppliers. Attach samples of such checks issued in 1975 both for payroll and outside supplier payments, and more than one sample of each if different types of checks were used, if you will do so without a request for production. If you do not attach copies, state where such checks may be inspected by defendants.

ANSWER: In response to this interrogatory, the following Exhibits are attached hereto:

- Exhibit 18: Sample checks used by Sandia in FY 1975

Exhibit 19: Sample checks used by Zia and LACI in FY 1975

Exhibit 20: Sample checks currently in use by Sandia

Exhibit 21: Sample checks currently in use by Zia

Checks currently in use by LACI are the same as Exhibit 19.

1004

Ex 17 - Ex. 18

SANDIA CORPORATION
SANDIA BASE
ALBUQUERQUE, NEW MEXICO

TO FIRST NATIONAL BANK IN ALBUQUERQUE
ALBUQUERQUE, NEW MEXICO

95-1
1022

CODE 02 CHECK NO. 41399 DATE 10/15/75 PAY $**755.00 CT

(SURNAME FIRST)

08115

OVER $1000* NOT VALID

[NAME DELETED]

(SURNAME FIRST)

SANDIA CORPORATION

CANCELLED

SC 9424-EF (7-63)

PAYABLE IF DESIRED AT WELLS FARGO LIVER
MORE , CALORNIA, 90-410/

216776 ⑈1022⑈000⑆ 100 000 202⑈

SANDIA CORPORATION
SANDIA BASE
ALBUQUERQUE, NEW MEXICO

TO FIRST NATIONAL BANK IN ALBUQUERQUE
ALBUQUERQUE, NEW MEXICO

95-1
1022

CHECK NO. 73216 DATE 02/03/75 PAY$******38.0

THE OPTICAL PUBLISHING CO INC
LENOX ROAD
PITTSFIELD MA 01201

SANDIA CORPORATION

CANCELLED

SC 9424-A2 (7-63)

YMENT OF THE ITEMS LISTED ON THE ACCOMPANYING REMITTANCE ADVICE.

,38359 ⑈1022⑈000⑆ 100 000 202⑈

226

SANDIA CORPORATION
SANDIA BASE
ALBUQUERQUE, NEW MEXICO

TO ALBUQUERQUE NATIONAL BANK
ALBUQUERQUE, NEW MEXICO

95-8
1022

CODE 02 CHECK NO. 18795 DATE 1/31/75 PAY $***146.70C

(SURNAME FIRST)

TO THE ORDER OF [NAME DELETED]

08256

OVER $500** NOT VALID

SANDIA CORPORATION

CANCELLED

SC 9424-EA (1-65)

PAYABLE (SURNAME FIRST) IF DESIRED AT WELLS FARGO BANK
LIVERMORE, CALIFORNIA, 90-410

192015 :1022:0008: 00 0286 0

SANDIA CORPORATION
SANDIA BASE
ALBUQUERQUE, NEW MEXICO

TO ALBUQUERQUE NATIONAL BANK
ALBUQUERQUE, NEW MEXICO

95-8
1022

CHECK NO. 71288 DATE 02/13/75 PAY$ *****120.00C

TO THE ORDER OF PLENUM PUBL CO
227 WEST 17TH ST
NEW YORK NY 10011

SANDIA CORPORATION

CANCELLED

SC 9424-A1 ** **

YMENT OF THE ITEMS LISTED ON THE ACCOMPANYING REMITTANCE ADVICE.

GENERAL ACCOUNT
LOS ALAMOS, NEW MEXICO 87544

105

EX. 19

1-3 1975

95-191
1022

REGISTERED RD-246 S1 2902 dlls 77 cts

PAY DOLLARS $ 2,902.77

TO THE ORDER

The First National Bank of Santa Fe
Los Alamos Branch

Void

LOS ALAMOS CONSTRUCTORS, INC.

C. D. Lyons

B. W. Burns

LOS ALAMOS BRANCH
THE FIRST NATIONAL BANK OF SANTA FE LOS ALAMOS, NEW MEXICO

⑆1022⑆0191⑆ 59 0012 3⑈ "0000290277"

I 116

THE ZIA COMPANY, LOS ALAMOS, NEW MEXICO

095788

95-191
1022

AEC ADVANCED FUNDS

JUN 26 1975

REGISTERED RD-246 S1 289 dlls 60 cts

AMOUNT
$ 289.60

THE ZIA COMPANY

PAY TO THE ORDER OF C. W. Ketchell

Void

NOT TO EXCEED $1,000.

⑆1022⑆0191⑆ 59 0006 9⑈ "00000 28960"

FIRST NATIONAL BANK OF SANTA FE
LOS ALAMOS BRANCH
LOS ALAMOS, NEW MEXICO

95-10

A.E.C. ADVANCED FUNDS
PAYROLL ACCOUNT
NOT TO EXCEED $500

THE ZIA COMPANY
LOS ALAMOS, NEW MEXICO

Void

08 31 75 62334

$119.97

PAY TO THE ORDER OF

[NAME DELETED]

*119 DOLLARS .97 CENTS

THE ZIA COMPANY

L. D. Lyons

W. Mellon

22-2 C4561

ATIONS OR ERASURES OF NAME
AMOUNT PAYABLE BY THIS CHECK
VOID UNLESS CASHED WITHIN 90 DAYS

FIRST NATIONAL BANK OF SANTA FE
LOS ALAMOS BRANCH
LOS ALAMOS, NEW MEXICO

⑈250648⑈ ⑆1070⑆0044⑆ 59 0007 7⑈ "00000 11997"

105

EX 120

106

EX. 20

100

Sandia Laboratories
Albuquerque, New Mexico 87115
OPERATED BY SANDIA CORPORATION
for
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
ADVANCE FUNDS ACCOUNT - CONTRACT (29-11-789

TO FIRST NATIONAL BANK IN ALBUQUERQUE
ALBUQUERQUE, NEW MEXICO

95-27
1070

CODE CHECK NO. DATE / /

PAY $ CTS

(SURNAME FIRST)

OVER $_____ NOT VALID

SANDIA CORPORATION

CANCELLED

SA 9424-EF(3-76)

(SURNAME FIRST)

0002 ⑆1070⑆0027⑆ 100 000 20 2⑈

Sandia Laboratories
Albuquerque, New Mexico 87115
OPERATED BY SANDIA CORPORATION
for
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
ADVANCE FUNDS ACCOUNT - CONTRACT (29-11-789

TO FIRST NATIONAL BANK IN ALBUQUERQUE
ALBUQUERQUE, NEW MEXICO

95-27
1070

CHECK NO. DATE / /

PAY $ CT

SANDIA CORPORATION

CANCELLED

SA 9424-AE(1

0002 ⑆1070⑆0027⑆ 100 000 20 2⑈

Sandia Laboratories
Albuquerque, New Mexico 87115
OPERATED BY SANDIA CORPORATION
for
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
ADVANCE FUNDS ACCOUNT - CONTRACT (29-11-789

TO ALBUQUERQUE NATIONAL BANK
ALBUQUERQUE, NEW MEXICO

95-32
1070

CODE CHECK NO. DATE / /

PAY $ CT

(SURNAME FIRST)

OVER $_____ NOT VALID

SANDIA CORPORATION

CANCELLED

SA9424-EA(3-76)

(SURNAME FIRST)

0002 ⑆1070⑆0032⑆ 00 0387 08⑈

106

229

EX. 21

1007

TAB STOP TAB STOP

16949

THE ZIA COMPANY, LOS ALAMOS, NEW MEXICO
CONTRACT W-17-028-ENG-90
U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
ADVANCE FUNDS ACCOUNT

THE FIRST NATIONAL BANK OF SANTA FE
LOS ALAMOS BRANCH
LOS ALAMOS, NEW MEXICO
85-83
1070

AMOUNT
$

THE ZIA COMPANY

AY
O THE
RDER OF:

Void

BY: Void

BY:

⑆1070⑈0083⑆ 59 0006 9⑈

ZIA COMPANY, LOS ALAMOS, NEW MEXICO
CONTRACT W-17-028-ENG-90
NERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
ADVANCE FUNDS ACCOUNT

85-83
107

THE ZIA COMPANY
LOS ALAMOS, NEW MEXICO

PAY TO THE
ORDER OF

Void

HELIGENDRO F MPUDIA

08 | 22 | 76 | 67187

$223.57

*223 DOLLARS •57 CENTS

THE ZIA COMPANY

2-9 | 81862

TIONS OR ERASURES OF NAME
UNT INVALIDATES THIS CHECK
AID UNLESS CASHED WITHIN 90 DAYS

E FIRST NATIONAL BANK OF SANTA FE
LOS ALAMOS BRANCH
LOS ALAMOS, NEW MEXICO

⑈311274 2⑈ ⑆1070⑈0083⑆ 59 0007 7⑈

STIPULATION REGARDING THE TESTIMONY OF W. C. STEIN WITH ONE EXHIBIT
(R.I. pp. 141-145)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil No. 75-413

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF NEW MEXICO, ET AL., DEFENDANTS

STIPULATION

The parties, by their respective attorneys, stipulate that a deposition of Mr. W. C. Stein, Senior Vice President and Cashier, First National Bank in Albuquerque would state the following facts:

1. A portion of the "advanced funds" (i.e., funds provided pursuant to 31 C.F.R. Part 205) utilized by Sandia Laboratories are provided through Bank Account No. 100-000-202 at the First National Bank in Albuquerque, hereinafter referred to as the "bank".

2. Consistent with the procedures described in the March 24, 1977, affidavit of Robert W. Scott, a Sandia employee completes Treasury Form TUS 5401 on each work day in the amount of the checks drawn by Sandia that day. On the following day the Sandia employee telephones the bank to provide the TUS 5401 number and amount which the bank is authorized to withdraw against the letter of credit. The bank then teletypes a request for the funds to the Federal Reserve Bank in Denver at which time the requested funds are credited to the bank's account at the Federal Reserve Bank. Upon receipt of the credit at the Federal Reserve Bank, the bank simultaneously enters the proceeds as a deposit to Bank Account No. 100-000-202 where the funds remain until the related Sandia checks clear for payment.

3. The reason for this one-day delay is to reduce insofar as possible the time that the funds are in the account before they are drawn on as payees put their checks through for payment. As a consequence, the balance in the account at any particular time tends to be quite low.

4. The bank maintains with respect to Account No. 100-000-202, the customary records which are maintained with respect to any other checking account. In addition, the bank maintains with respect to said account a copy of an agreement attached hereto as Exhibit 1. Exhibit 1 is the only record maintained by the bank with respect to said account which is different from records kept for any other checking account.

5. All the persons empowered to write checks drawn on the named account are Sandia employees.

6. Any monthly statements of account which the bank prepares are routinely sent to Sandia.

7. The bank has not to date received any directives from ERDA or its predecessor, the Atomic Energy Commission, requiring it to make some special disposition of the funds in the account utilized by Sandia. To date all withdrawals from the account have been upon submission of checks drawn by Sandia employees.

JOHN J. MCCARTHY
Chief, General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

By Daniel H. Friedman
DANIEL H. FRIEDMAN
Special Assistant Attorney General
Post Office Box 1671
Santa Fe, New Mexico
(505) 827-3221

VICTOR R. ORTEGA
United States Attorney
Post Office Box 607
Albuquerque, New Mexico 87103

By Ruth C. Streeter
RUTH C. STREETER
First Assistant United States Attorney

EXHIBIT 1

October 28, 1949

First National Bank
in Albuquerque
Albuquerque, New Mexico

Gentlemen:

It is proposed to open an account in your Bank under the name "SANDIA CORPORATION, AEC ADVANCED FUNDS UNDER CONTRACT NO. AT-(29-1)-789", which shall be subject to the following terms and conditions:

1. The funds deposited therein shall at all times be the property of the Atomic Energy Commission. Sandia Corporation shall acquire no property right, title or interest in or to such funds other than the right to make expenditures therefrom for the purpose of paying costs of performing the work under said Contract.

2. Your Bank shall be under no liability to the Commission or Sandia Corporation for the withdrawal of any funds from said account by properly endorsed checks either signed by a representative of Sandia Corporation or, if in amounts up to $1,000.00, bearing a facsimile signature of such representative, certified in either case to be so authorized, under the seal of Sandia Corporation.

3. The Commission shall have the right to inspect the books and records of your Bank relating to the account or to request and receive from your Bank any information concerning the account.

4. Your Bank shall, when directed by the Commission, discontinue honoring checks thereafter drawn on the account by Sandia Corporation. The Commission may also direct your Bank to return to the Commission

all or any portion of the balance then in the account, provided that your Bank will return such funds to the Commission only by means of a check made payable to the Treasurer of the United States.

5. When your Bank receives directions of the character specified above written on Atomic Energy Commission stationery which appear to have been signed by or at the direction of, or under the authority of the Commission, such directions shall be deemed to have been properly issued by the Commission and your Bank shall follow such directions and shall be under no liability to Sandia Corporation for so doing.

6. To secure the funds deposited in said account, your Bank will keep U.S. Bonds on deposit with a Federal Reserve Bank or the U.S. Treasury at all times equal in value to the balance in the account. Such Bonds shall be deposited under a Joint Custody Receipt naming your Bank and the Atomic Energy Commission. Your Bank and the Commission will agree upon procedures to be followed in event it becomes appropriate to increase or decrease the number of bonds deposited in your Bank or to substitute other bonds for the bonds then on deposit.

If the arrangement set forth above and approved by the Atomic Energy Commission is acceptable to you, please return the four attached copies of this letter after so indicating in the space provided below.

SANDIA CORPORATION

By /s/ George A. Landry
GEORGE A. LANDRY
President

APPROVED:

ATOMIC ENERGY COMMISSION

By /s/ Carroll L. Tyler
CARROLL L. TYLER
Manager
Santa Fe Operations Office

The undersigned Bank has received a copy of this agreement and agrees to handle all funds deposited in said account by Sandia Corporation as above provided.

FIRST NATIONAL BANK
IN ALBUQUERQUE
By /s/ [Illegible]

ERNEST CUARON AFFIDAVIT, WITH TWO EXHIBITS, 8/6/77 EXHIBIT 1 TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT (R.III)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 75-418

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF NEW MEXICO, ET AL., DEFENDANTS

AFFIDAVIT

Ernest Cuaron being duly sworn deposes and says:

1. I am the Controller of New Mexico Professional Standards Review Organization, Inc., (hereinafter "the corporation") a not-for-profit corporation organized in 1971 under the laws of New Mexico, and located at 2650 Yale Boulevard, S.E., Albuquerque, New Mexico.

2. The corporation performs a contract for the United States Department of Health, Education and Welfare under which it reviews admissions of Title XIX, XVIII and V patients into a New Mexico hospital or institution and the length of stay of such patients, to see if they are justified by medical necessity. This function protects against unnecessary expenditures under federal medical assistance programs.

3. Up to July 1, 1977, the funds for operation of the corporation were obtained from the Department of Health, Education and Welfare by submission of monthly vouchers to obtain reimbursements for expenditures already made.

4. Beginning August 1, 1977, the corporation has begun to receive its funds pursuant to Federal Letter of

Credit No. 75-08-M786, attached hereto as Exhibit A, which funds are deposited in Account No. 05-7962-9 at the Albuquerque National Bank, Albuquerque, New Mexico. This method of financing replaces the voucher system described in paragraph 3.

5. There is an agreement among the corporation, the bank and the Department of Health, Education and Welfare concerning these funds, which is attached hereto as Exhibit B. This agreement was entered into two years before we began receiving our funds by a letter of credit but instead were submitting monthly vouchers. It remains applicable to the new funding arrangement.

6. The corporation does not mingle these funds in the account with any other funds it receives. It writes checks directly on this account to pay its own staff and outside suppliers.

7. When the corporation anticipates that expenditures have to be made, such as payroll payments, I complete Treasury Form TUS-5401 and bring it to the Albuquerque National Bank which transmits the form to the Federal Reserve Bank in Denver which credits the requested funds to our account. These funds are then available to cover the checks drawn on the account.

8. The corporation pays and will continue to pay New Mexico gross receipts tax on its payments from the Department of Health, Education and Welfare. These tax payments are allowable costs reimbursed by the federal agency.

/s/ Ernest Cuaron
ERNEST CUARON

Subscribed and sworn to before me on this 6th day of August, 1977.

/s/ [Illegible]
Notary Public

My Commission Expires: August 9, 1980

MAY 1973
6 TREASURY FRM 2000

ISSUING AGENCY	LETTER OF CREDIT Austin TREASURY DEPARTMENT CIRCULAR No. 1075, Revised	LETTER OF CREDIT NUMBER 75-08-N706 AMENDMENT NUMBER 0
AGENCY STATION SYMBOL 75-08-9701	(FOR AGENCY USE)	EFFECTIVE DATE = AUGUST 1, 1977 =
TO: The Federal Reserve Bank DENVER	BRANCH BANK AT KANSAS CITY	

In accordance with the authorization of the Fiscal Assistant Secretary, Treasury Department, there is hereby authorized for the account and responsibility of the issuing agency a letter of credit:

IN FAVOR OF	FOR DEPOSIT ONLY TO
New Mexico Professional Standards Review Organization 2650 Yale Blvd. S.E. Albuquerque, New Mexico 87106	Albuquerque National Bank 303 Roma NW Albuquerque, NM Acct # 05-7962-9 ACCOUNT

AMOUNT AUTHORIZED		PRIOR AUTHORIZATION	THIS CHANGE
$ 58,000.00	☒ EACH MONTH ☐ EACH QUARTER ☐ WITHOUT TIME LIMIT ☐ _____	$ - 0.00 =	Increase $ Decrease $

☐ The unpaid balance of this letter of credit will remain available until you are advised in writing by the Treasury Department that this letter has been revoked.*

OR

☐ The unpaid balance of this letter of credit is revoked at the end of each period indicated and the full amount reestablished at the beginning of the following period until you are advised in writing by the Treasury Department that this letter has been revoked.*

The amount of this letter of credit is hereby certified to be drawn against, upon presentation to you of Form TUS 5401, Payment Voucher on Letter of Credit, by the official(s) of the recipient organization whose signature(s) appear(s) on the Standard Form 1194, Authorized Signature Card for Payment Vouchers on Letter of Credit, attached hereto or previously or subsequently furnished you through the Treasury Department.

The amount of each payment voucher paid by a Federal Reserve Bank or branch to a designated commercial bank for credit to the account of the recipient organization shall constitute payment to the recipient organization by the United States.

I certify to the Treasury Department that the payments authorized herein are correct and proper for payment from the appropriations or funds legally committed and available for the purpose, when paid in accordance with the terms and condition cited above.

*This letter of credit is irrevocable to the extent the recipient organization has obligated funds in good faith thereunder in executing the authorized Federal program in accordance with the grant, contract, or other agreement.

NEW LETTER OF CREDIT

JULY 22, 1977 — ARTHUR L. FRANIUSKI, JR.

DATE CERTIFIED — AUTHORIZED CERTIFYING OFFICER

CHIEF, DEPOSITARY LIAISON SECT.

TYPED NAME AND TITLE

1193-103

EXHIBIT B

AGREEMENT FOR SPECIAL BANK ACCOUNT

Agreement entered into this 18th day of July, 1975 between the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this Agreement, New Mexico Professional Standards Review Organization, a corporation under the laws of New Mexico hereinafter called the Contractor, and the Albuqueque National Bank, a banking corporation under the laws of the State of New Mexico located at 123 Central NW hereinafter called the Bank.

RECITALS

(a) Under the date of November 4, 1974 the Government and the Contractor entered into Contract No. HSA 105-240-75-0003 providing for the making of advance payments to the Contractor. Copy of such advance payment provisions has been furnished to the Bank.

(b) Said Contract requires that amounts advanced to the Contractor thereunder be deposited in a Special Bank Account or accounts at a member bank or banks of the Federal Reserve System or any "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation (Act of August 23, 1935; 49 Stat. 684, as amended; 12 U.S.C. 264), separate from the Contractor's general or other funds; and, the Bank being such a bank, the parties are agreeable to so depositing said amounts with the Bank.

(c) This Special Bank Account shall be designated The New Mexico Professional Standards Review Organization Health Services Administration Special Bank Account.

COVENANTS

In consideration of the foregoing, and for other good and valuable considerations, it is agreed that;

(1) The Government shall have a lien upon the credit balance in said account to secure the repayment of all advance payments made to the Contractor, which lien shall be superior to any lien or claim of the bank with respect to such account.

(2) The Bank will be bound by the provisions of said contract or contracts relating to the deposit and withdrawal of funds in the above Special Bank Account, but shall not be responsible for the application of funds withdrawn from said account. After receipt by the Bank of written directions from the Contracting Officer, or from the Administering Office designated in the advance payment contract mentioned above, or from the duly authorized representative of the Contracting Officer or the Administering Office, the Bank shall act thereon and shall be under no liability to any party hereto for any action in accordance with the said written directions. Any written directions received by the Bank through the Contracting Officer upon Health Services Administration stationery and purporting to be signed by, or by the direction of the Contracting Officer or his duly authorized representative, shall insofar as the rights, duties, and liabilities of the Bank are concerned, be conclusively deemed to have been properly issued and filed with the Bank by the Health Services Administration.

(3) The Government, or its authorized representatives, shall have access to the books and records maintained by the Bank with respect to such Special Bank account at all reasonable times and for all reasonable purposes, including (but without limiting and generality thereof) the inspection or copying of such

books and records and any and all memoranda, checks, correspondence or documents appertaining thereto. Such books and records shall be preserved by the Bank for a period of six (6) years after the closing of this Special Bank Account.

(4) In the event of the service of any writ of attachment, levy of execution, or commencement of garnishment proceedings with respect to the Special Bank Account, the Bank will promptly notify the Accounting and Finance Section, Health Services Administration, Rockville, Maryland 20852.

IN WITNESS THEREOF the parties hereto have caused this agreement to be executed as of the day and year first above written.

CONTRACTOR

By /s/ [Illegible]
Contractor's Representative

/s/ Secretary
Title

By /s/ [Illegible]
Bank's Representative

Assistant Cashier
Title

UNITED STATES OF AMERICA

By /s/ Albert E. [illegible]
Government's Representative

Contracting Officer
Title

EDC/gm/7.25

ZIA COMPANY STANDARD TERMS AND CONDITIONS FOR FIXED PRICE PURCHASE ORDERS (Rev 6-75)

(EXHIBIT 1 TO WENDELL L. MILLER AFFIDAVIT) (R. II)

1. DEFINITIONS: As used throughout this order, the following terms shall have the meaning set forth below:

   (a) The term "Government" means the United States of America.

   (b) The term "ERDA" means the United States Energy Research & Development Administration or any duly authorized representative thereof, including the Contracting Officer except for the purpose of deciding an appeal under the article entitled "Disputes."

   (c) The term "Contracting Officer" means the person executing the prime contract on behalf of the Government and includes his successors or any duly authorized representative of any such person.

   (d) The term "Buyer" means THE ZIA COMPANY in the performance of the prime contract W-17-028-ENG-90 with the United States of America and includes any duly authorized representative thereof.

   (e) Except as otherwise provided in this order, the term "subcontracts" includes purchase orders under this purchase order.

2. CHANGES: The Buyer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this order, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Buyer in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any

such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this order, whether changed or not changed by any such order, an equitable adjustment shall be made in the order price or delivery schedule, or both, and the order shall be modified in writing accordingly. Any claim by the seller for adjustment under this article must be asserted within 30 days from the date of receipt by the Seller of the notification of change: Provided, however, That the Buyer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this order, where the cost of property made obsolete or excess as a result of a change is included in the Seller's claim for adjustment, the Buyer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the article of this order entitled "Disputes." However, nothing in this article shall excuse the Seller from proceeding with the order as changed.

3. EXTRAS: Except as otherwise provided in this order, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Buyer.

3. VARIATION IN QUANTITY: No variation in the quantity of any item called for by this order will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this order.

5. INSPECTION:

(a) All supplies (which term throughout this article includes without limitation raw materials, com-

ponents, intermediate assemblies, and end products) shall be subject to inspection and test by the Buyer and ERDA, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this order, the Buyer shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Buyer, corrected in place by and at the expense of the Seller promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If the Seller fails promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Buyer either (i) may by subcontract or otherwise replace or correct such supplies and charge to the Seller the cost occasioned the Buyer thereby, or (ii) may terminate this order for default as provided in the article of this order entitled "Default." Unless the Seller corrects or replaces such supplies within the delivery schedule, the Buyer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the article of this order entitled "Disputes."

(c) If any inspection or test is made by the Buyer or the ERDA on the premises of the Seller or a subcontractor, the Seller without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the inspection by the Buyer or ERDA in the performance of their duties. If inspection by the Buyer or ERDA or test is made at a point other than the premises of the Seller or a subcontractor, it shall be at the expense of the Buyer except as otherwise provided in this order; Provided, That in case of rejection the Buyer shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by the Buyer or ERDA shall be performed in such a manner as not to unduly delay the work. The Buyer reserves the right to charge to the Seller any additional cost of Buyer inspection and test when supplies are not ready at the time such inspection and test is requested by the Seller or when reinspection or retest is necessitated by prior rejection. Acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this order; but failure to inspect and accept or reject supplies shall neither relieve the Seller from responsibility for such supplies as are not in accordance with the order requirements nor impose liability on the Buyer therefor.

(d) The inspection and test by the Buyer or ERDA of any supplies or lots thereof does not relieve the Seller from any responsibility regarding defects or other failures to meet the order requirements which may be discovered prior to acceptance. Except as otherwise provided in this order, acceptance shall be conclusive except as regards

latent defects, fraud, or such gross mistakes as amount to fraud.

(e) The Seller shall provide and maintain in inspection system acceptable to the Buyer covering the supplies hereunder. Records of all inspection work by the Seller shall be kept complete and available to the Buyer and ERDA during performance of this order and for such longer period as may be specified elsewhere in this order.

6. RESPONSIBILITY FOR SUPPLIES: Except as otherwise provided in this order, (i) the Seller shall be responsible for the supplies covered by this order until they are delivered at the designated delivery point, regardless of the point of inspection; and (ii) the Seller shall bear all risks as to rejected supplies after notice of rejection, except that the Buyer shall be responsible for the loss, or destruction or damage to the supplies only if such loss, destruction or damage results from the gross negligence of officers, agents, or employees of the Buyer acting within the scope of their employment.

7. PAYMENTS: The Seller shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted (dates be shown on the invoices or vouchers) or services rendered and accepted less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Buyer when the amount due on such deliveries so warrants; or, when requested by the Seller, payments for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000 or 50 percent of the total amount of this order.

8. EXAMINATION OF RECORDS: The Seller agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until

the expiration of three years after final payment under this order, or of the time periods for the particular records specified in Part 1-20 of the Federal Procurement Regulations of CFR Part 1-20), whichever expires earlier, have access to and the right to examine any directly pertinent books, documents, papers and records of Seller involving the actions related to this order: Provided, however, that this Article shall not apply to this order if the price of this order does not exceed Two Thousand Five Hundred no/100 Dollars ($2,500.00) or is an order for public utility services at rates established for uniform application to the general public. The periods of access and examination described herein shall continue until any Disputes appeals, litigation, or Comptroller General exceptions have been disposed of.

9. DEFAULT:

(a) The Buyer may, subject to the provisions of paragraph (c) below, by written notice of default to the Seller, terminate the whole or any part of this order in any one of the following circumstances:

(i) If the Seller fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) If the Seller fails to perform any of the other provisions of this order or so fails to make progress as to endanger performance of this order in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer periods the Buyer may authorize in writing) after receipt of notice from the Buyer specifying such failure.

(b) In the event the Buyer terminates this order in whole or in part as provided in paragraph (a) of this article, the Buyer may procure, upon such terms and in a manner as the Buyer may deem appropriate, supplies or services similar to those so terminated, and the Seller shall be liable to the Buyer for any excess costs for such similar supplies or services: Provided That the Seller shall continue the performance of this order to the extent not terminated under the provisions of this article.

(c) Except with respect to defaults of subcontractors, the Seller shall not be able for any excess costs if the failure to perform the order arises out of or beyond the control and without the fault or negligence of the Seller. Such causes may include, but are not restricted to, acts of God or of the public acts of the Government in either its sovereign or contractual capacity, fire, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Seller. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Seller and subcontractor and without the fault or negligence of either of them, the Seller shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Seller to meet the required delivery schedules.

(d) If this order is terminated as provided in paragraph (a) of this article the Buyer, in addition to any other rights provided in this article, may

require the Seller to transfer title to the Government and deliver to the Buyer or the Government in the manner and to the extent directed by the Buyer, (i) any completed supplies, and (ii) such partially completed supplies and material, parts, tools, dies, jigs, fixtures, plans, drawings, information, and purchase order rights (hereinafter called "manufacturing materials") as the Seller has specifically produced or specifically acquired for the performance of such of this order as has been terminated; and the Seller shall, upon direction from the Buyer, protect and preserve property in possession of the Seller in which the Buyer or the Government has an interest. Payment for completed supplies delivered to and accepted by the Buyer shall be at the order price. Payment for manufacturing materials delivered to and accepted by the Buyer and for the protection and preservation of property shall be in the amount agreed upon by Seller and Buyer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the article of this contract entitled "Disputes." The Buyer may withhold from amounts otherwise due the Seller for such completed supplies or manufacturing materials such sum as the Buyer determines to be necessary to protect the Buyer against loss because of outstanding liens or claims of former lien holders.

(e) If, after notice of termination of this order under the provisions of this article, it is determined for any reason that the Seller was not in default under the provisions of this article, or that the default was excusable under the provisions of this article, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the article

providing for termination for convenience of the Buyer.

(f) The rights and remedies of the Buyer and the Government provided in this article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this order.

(g) As used in paragraph (c) of this clause, the terms "subcontractor" and "subcontractors" mean subcontractor(s) at any tier.

10. DISPUTES AND PAYMENT OF INTEREST ON SELLERS' CLAIM:

(a) Except as otherwise provided in this purchase order, any dispute concerning a question of fact arising under the order which is not disposed of by agreement shall be decided by the ERDA Contracting Officer for the prime contractor's Contract No. W-17-028-ENG-90, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the price contractor and the Seller. The decision of the Contracting Officer shall be final and conclusive unless within 30 days from the date of receipt of such copy the Seller mails or otherwise furnishes to the Contracting Officer a written appeal addressed to ERDA. The decision of ERDA or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous. In connection with any appeal proceeding under this clause, the Seller shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Seller shall proceed diligently

with the performance of this order and in accordance with Contracting Officer's decision.

(b) This disputes clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, That nothing in this order shall be construed as making final the decision of any administrative official, representative, or board on question of law.

(c) If an appeal is filed by Seller from the final decision of the ERDA Contracting Officer for the Zia Company Contract W-17-028-ENG-90, under this Article denying a claim arising under this order, simple interest on the amount of the claim finally determined owed by the Zia Company shall be payable to the Seller in accordance with FPR 1-1.322.

11. BUY AMERICAN ACT:

(a) In acquiring end products, the Buy American Act (41 U.S. Code 10 a-d) provides that the Government give preference to domestic source end products. For the purpose of this article:

(i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products;

(ii) "end products" means those articles, materials, and supplies, which are to be acquired under this order for public use; and

(iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, pro-

duced, or manufactured in the United States exceeds 50 per cent of the cost of all its components. For the purpose of this (a) (iii) (B), components of foreign origin of the same type or kind as the products referred to in (b) (ii) or (iii) of this article shall be treated as components mined, produced, or manufactured in the United States.

(b) The Seller agrees that there will be delivered under this order (by the Seller, Subcontractors, materialman, and suppliers) only domestic source end products, except end products:

(i) which are for use outside the United States;

(ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonable available commercial quantities and of a satisfactory quality;

(iii) as to which ERDA determines the domestic preference to be inconsistent with the public interest; or

(iv) as to which the Commission determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954.)

12. BILLS OF LADING WHERE DELIVERY IS AT POINT OF ORIGIN: The following clause shall be specified in all commercial bills of lading used by the Seller in making shipments hereunder where delivery is at point of origin: "This shipment is for the account of the U.S. Government which will assume

the freight charges, and is subject to the terms and conditions set forth in the standard form of the U.S. Government bill of lading and to any available special rates or charges."

13. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—OVERTIME COMPENSATION: This order, to the extent that it is of a character specified in the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), is subject to the following provisions and to all other applicable provisions and exceptions of such Act and the regulations of the Secretary of Labor thereunder.

(a) OVERTIME REQUIREMENTS: No Seller or subcontractor contracting for any part of the Purchase Order work which may require or involve the employment of laborers, mechanics, apprentices, trainees, watchmen, and guards shall require or permit any laborer, mechanic, apprentice, trainee, watchman, or guard in any workweek in which he is employed on such work in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek on work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer, mechanic, apprentice, trainee, watchman, or guard receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek, whichever is the greater number of overtime hours.

(b) VIOLATION; LIABILITY FOR UNPAID WAGES; LIQUIDATED DAMAGES: In the event of any violation of the provisions of paragraph (a), the Seller and any subcontractor responsible therefor shall be liable to any affected

employee for his unpaid wages. In addition, such Seller and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer, mechanic, apprentice, trainee, watchman or guard employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of 8 hours or in excess of his standard workweek of 40 hours without payment of the overtime wages required by paragraph (a).

(c) WITHHOLDING FOR UNPAID WAGES AND LIQUIDATED DAMAGES: The Buyer may withhold from the Seller, from any moneys payable on account of work performed by the Seller or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such Seller or subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) SUBCONTRACTS: The Seller shall insert paragraphs (a) through (d) of this clause in all subcontracts, and shall require their inclusion in all subcontracts of any tier.

(e) RECORDS: The Seller shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for 3 years from the completion of the contract.

14. WALSH-HEALEY PUBLIC CONTRACTS ACT: If this order is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Con-

tracts Act, as amended (41 U.S. Code 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

15. EQUAL OPPORTUNITY: The following article is applicable unless this order is exempt under the rules and regulations and relevant orders of the Secretary of Labor (41 CFR. ch. 60).

During the performance of this order, the Seller agrees as follows:

(a) The Seller will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The Seller will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Seller agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Buyer setting forth the provisions of this Equal Opportunity article.

(b) The Seller will, in all solicitations or advertisements for employees placed by or on behalf of the Seller, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

(c) The Seller will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, "a notice to be provided by the Buyer, advising the labor union or workers' representative of the Seller's commitments under this "Equal Opportunity Clause," and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Seller will comply with all provisions of Executive Order No. 11246 of September 24, 1965 and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Seller will furnish all information and reports required by Executive Order No. 11245 of September 24, 1965 and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by ERDA and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(f) In the event of the Seller's noncompliance with the Equal Opportunity article of this order or with any of the said rules, regulations, or orders, this order may be cancelled, terminated, or suspended in whole or in part and the Seller may be declared ineligible for further Government orders in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Seller will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Seller will take such action with respect to any subcontractor or purchase order as ERDA may direct as a means of enforcing such provisions, including actions for noncompliance: Provided, however, That in the event the Seller becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by ERDA, the Seller may request the Government to enter into such litigation to protect the interests of the Government.

16. COMMERCIAL WARRANTY:

(a) The Seller agrees that the supplies or services furnished under this order shall be covered by the most favorable commercial warranties the Seller gives to any customer for the same or substantially similar supplies or services and that the rights and remedies provided by this article shall extend to the Government and are in addition to and do not limit any rights afforded to Buyer by any other article of this order.

(b) The Seller shall furnish to the Buyer copies of the most favorable commercial warranties the Seller gives to any customer for the same or substantially similar supplies or services, and such warranties shall be deemed a part of this purchase order.

17. CONVENANT AGAINST CONTINGENT FEES: Seller warrants that no persons or selling agency has

been employed or retained to solicit or secure this order upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Seller for the purpose of securing business. For breach or violation of this warranty the Buyer shall have the right to annul this order without liability or in its discretion to deduct from the purchase order price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

18. UTILIZATION OF SMALL BUSINESS CONCERNS: (Applies if the value of this order exceeds $5,000.)

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) Seller agrees to accomplish the maximum amount of subcontracting to small business concerns that Seller finds to be consistent with the efficient performance of this order.

19. UTILIZATION OF LABOR SURPLUS AREA CONCERNS: (Applies if the value of this order exceeds $5,000.)

(a) It is the policy of the Government to award orders to labor surplus area concerns that (1) have been certified by the Secretary of Labor (hereafter referred to as certified-eligible concerns with first or second preferences) regarding the employment of a proportionate number of disadvantaged individuals and have agreed to perform substantially (i) in or near sections

of concentrated unemployment or underemployment or in persistent or substantial labor surplus areas or (ii) in other areas of the United States, respectively, or (2) are noncertified concerns which have agreed to perform substantially in persistent or substantial labor surplus areas, where this can be done consistent with the efficient performance of the order and at prices no higher than are obtainable elsewhere. The Seller agrees to use his best efforts to place his subcontracts in accordance with this policy.

(b) In complying with paragraph (a) of this Article and with paragraph (b) of the Article of this order entitled "Utilization of Small Business Concerns" the Seller in placing his subcontracts shall observe the following order of preference: (1) Certified-eligible concerns with a first preference which are also small business concerns; (2) other certified eligible concerns with a first preference; (3) certified-eligible concerns with a second preference which are also small business concerns; (4) other certified-eligible concerns with a second preference; (5) persistent or substantial labor surplus area concerns which are also small business concerns; (6) other persistent or substantial labor surplus area concerns; and (7) small business concerns which are not labor surplus area concerns.

20. DISCOUNTS: Discount time will be computed from whichever of the following dates is the latest: (1) the date of delivery of the supplies to carrier (when delivery is f.o.b. at point of origin), (2) the date of delivery at destination (when delivery is f.o.b. at point of destination), (3) the date correct invoice or voucher is received in the office specified by the buyer. Payment is deemed to be made, for the pur-

pose of earning the discount, on the date of mailing of the Buyer's check.

21. ASSIGNMENT. This order is assignable by Buyer to the Government or its designee. Neither this order nor any interest therein nor claim thereunder shall be assigned or transferred by the Seller except as expressly authorized in writing by the Buyer.

22. FEDERAL, STATE, AND LOCAL TAXES:

(a) Except as may be otherwise provided in this order, the price includes all applicable federal, state and local taxes and duties.

(b) Notwithstanding the provisions of (a) above, if the Seller intends to collect from the Buyer under this order any amount attributable to taxes imposed by the New Mexico Gross Receipts and Compensating Tax Act, such amount shall be separately stated in the price provision of this order and in Seller's invoices. The Seller warrants that, except as separately stated in the price provision in accordance with this paragraph (b), the price does not include any amounts attributable to taxes imposed by the New Mexico Gross Receipts and Compensating Tax Act or contingencies for such taxes.

(c) With respect to any taxes separately stated in the price provision of this order and on Seller's invoices in accordance with paragraph (b) the Buyer agrees either (1) to furnish to the Seller a non-taxable transaction certificate, or other document acceptable to the New Mexico Bureau of Revenue for purposes of precluding the application of such taxes to the Seller on account of this transaction or (2) to pay to the Seller any portion of such separately stated amount that

Seller is required to pay to the New Mexico Bureau of Revenue because of Buyer's inability to furnish such certificate or other document.

23. PROPERTY:

(a) Title to material purchases hereunder shall pass directly from the Seller to the Government at the point of delivery which shall be at Seller's plant—or such other point as may be specified in this order.

(b) (1) (Applicable if this order involves Government property furnished by Buyer to Seller herein called "Buyer-furnished property.") The delivery schedules set forth in this order are based upon the expectation that the Buyer-furnished property is not delivered to the Seller by such time, the Buyer shall, if requested by the Seller, determine if any delay has been occasioned the Seller thereby, and if so shall grant a reasonable extension of the time for completion of performance. The Buyer shall not be liable to Seller for damages of loss of profit by reason of any delay in delivery of said Buyer-Furnished property, except that in case of such delay, upon written request of the Seller, an equitable adjustment shall be made in the delivery schedule of this order, or price, or both, and in other contractual provisions affected thereby, in accordance with the procedures provided for in the article entitled "Changes."

(2) (Applicable if this order involves Seller-acquired property.) In connection with its work under this order, the Seller shall ac-

quire or manufacture for the Buyer's account property (such as special tooling or facilities) listed in the order hereinafter referred to as "Seller-acquired property."

(c) Title to all Buyer-furnished or Seller-acquired property shall remain in the Government. Title hereto shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall any such property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty. The Seller shall maintain adequate property control records of such property consistent with good business practice and as may be prescribed by the Buyer; and small cause all such property to be to be clearly marked (if not so marked) to show that it is property of the Government.

(d) Buyer-furnished or Seller-acquired property shall be used only for the performance of this order.

(e) The Seller shall, in accordance with sound industrial practice and without additional cost to the Buyer, maintain in operating condition, repair, protect, and preserve such Buyer-furnished or Seller-acquired property until disposed of by the Seller in accordance with this article. Should any replacement of any such property become necessary during the term of this order other than by reason of the negligence or fault of the Seller, the same shall be made by the Seller at the direction of and for the account of the Buyer and the title thereto shall vest in the Government and any delay occasioned thereby shall be considered an excusable delay under this order.

(f) (1) Except for loss or destruction of, or damage to, Buyer-furnished or Seller-acquired property resulting from a failure of the Seller, due to wilful misconduct or lack of good faith of the Seller's managerial personnel to maintain in operating condition, repair, protect, and preserve such property as required by subparagraph (e) hereof, the Seller shall not be liable for loss or destruction of, or damage to, such property (i) caused by any peril while the property is in transit off the Seller's premises, or (ii) caused by any of the following perils while the property is on the Seller's premises, or on any other premises where such property may properly be located or by removal therefrom because of any of the following perils: Fire; lightning; windstorm; cyclone; tornado; hail; explosion; riot attending a strike; civil commotion; vandalism and malicious mischief; aircraft or objects falling therefrom; vehicles running on land or tracks (excluding vehicles owned or operated by the Seller or any agent or employee of the Seller); smoke; springler leakage; earthquake or volcanic eruption; flood, meaning thereby raising of rivers or streams; enemy attack or any action by the military, navy, or air forces of the United States in resisting enemy attack.

The perils as set forth above are hereinafter called "excepted perils." The term "Seller's managerial personnel," as used in this article, means the Seller's directors, officers, and such of its managers, superintendents, or other equivalent representatives who have supervision or direction of

(1) all of or substantially all of the Seller's business; or (2) all or substantially all of the Seller's operation at any one plant or separate location at which the work is being performed; or (3) a separate or complete major industrial operation in connection with performance of the order; or (4) a separate and complete major construction, alteration, or repair operation in connection with performance of the order.

(2) Upon the happening of loss or destruction of, or damage to, Buyer-furnished or Seller-acquired property, the Seller shall communicate with the Buyer and shall take all reasonable steps to protect such property, put all such property in the best possible order, and furnish to the Buyer a statement of (i) the loss, destroyed, and damaged Buyer-furnished or Seller-acquired property, (ii) the time and origin of the loss, destruction, or damage, (iii) all known interests in the commingled property of which such is a part, and (iv) the insurance, if any, covering any part of or interest in such commingled property.

(3) With the approval of the Buyer after loss or destruction of, or damage to, the Buyer-furnished or Seller-acquired property, and subject to such conditions and limitations as may be imposed by the Buyer, the Seller shall, in order to minimize the loss to Buyer and the Government or in order to permit resumption of business or the like, sell for the account of the Government, any item of such property which has been damaged beyond practicable repair, or which is so commingled or combined with property of

others, including the Seller, that separation is impracticable.

(4) Except to the extent of any loss or destruction, or damage to, Buyer-furnished or Seller-acquired property for which the Seller is relieved of liability under the foregoing provisions of this paragraph, and except for reasonable wear and tear or depreciation, or the utilization or disposition of such property in accordance with the provisions of this order the property shall be returned to the Buyer in as good condition as was received by the Seller.

(5) In the event the Seller is indemnified, reimbursed, or compensated for any loss or destruction of, or damage to Buyer-furnished or Seller-acquired property caused by an excepted peril, it shall equitably reimburse Buyer or the Government. The Seller shall do nothing to prejudice the Government's rights to recover against third parties for any such loss, destruction or damage and upon the request of the Buyer shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution or suits, and to execution of instructions of assignment in favor of the Government) in obtaining recovery.

(g) The Buyer and the Government shall at all times have access to the premise wherein any Buyer-furnished or Seller-acquired property is located.

(h) Upon the completion of this order, the Seller shall submit, in a form acceptable to the Buyer,

inventory schedule covering all items of Buyer-furnished or Seller-acquired property not consumed in the performance of this order (including any resulting scrap) or not theretofore delivered to the Buyer, and shall hold the same at no charge to the Buyer for a period of sixty days, unless the period of time is extended by mutual agreement. At the expiration of such period or upon the Buyer's earlier order the Seller shall dismantle, prepare for shipment and shall store or deliver said property to the Buyer on cars, trucks at Seller's plant at the expense of the Buyer, or make such other disposal of said property as may be directed by the Buyer. The net proceeds for any such disposal shall be credited to the purchase order price or shall be paid over as the Buyer may direct.

24. TERMINATION FOR CONVENIENCE:

(a) The performance of work under this order may be terminated in whole, or from time to time in part, by the Buyer in accordance with this article. Any such termination shall be effected by delivery to the Seller of a Notice of Termination specifying the extent to which performance of work under the order is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by Buyer, the Seller shall:

(1) Stop work under the order on the date and to the extent specified in the Notice of Termination;

(2) Place no further subcontracts for materials, services, or facilities, except as may be

necessary for completion of such portion of the work under the order as is not terminated;

(3) Terminate all subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;

(4) Assign to the Buyer, in the manner, at the times, and to the extent —— by the Buyer, all of the rights, title and interests of the Seller under subcontracts so terminated, in which case the Buyer shall have the rule in its discretion, to settle or pay any or all claims arising out of the termination of such subcontracts;

(5) Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Buyer, to the extent he may require, which approval or ratification shall be final for all the purposes of this article;

(6) Transfer title to the Government and deliver in the manner, at the time and to the extent, if any, directed by the Buyer (i) the fabrication of unfabricated parts, work in process, completed work, supplies, and of material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (ii) the completed or partially completed plans, drawings, information and other property which, if the order had been completed, would have been required to be furnished to the Buyer;

(7) Use his best efforts to sell, in the manner, at the time, to the extent and at the price or prices directed or authorized by the Buyer, any property of the types referred to in (6) above: Provided, however, that the Seller (i) shall not be required to extend credit to any purchaser and (ii) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Buyer; And provided further, That the proceeds of any such transfer or disposition shall be applied to reduction of any payments to be made by the Buyer to the Seller under order or shall otherwise be credited to the price or cost of the work covered by this order or paid in such other manner as the Buyer may choose;

(8) Complete performance of such part of the work as shall not have been ——ted by the Notice of Termination; and

(9) Take such action, as may be necessary, or as the Buyer may direct, for protection and preservation of the property related to this order within the possession of the Seller and in which the Buyer or the Government has or may acquire an interest.

At any time after expiration of the plant clearance period, as defined in part 1-8.1 of the Federal Procurement Regulations (41 CFR 1-8.1), as the ——tion may be amended from time to time, the Seller may submit to the Buyer certified as to quantity and quality, or any or all items of termination ——tory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Buyer, and may request the Buyer to

move such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items remove them or enter into a storage agreement covering the same: Provided the list submitted shall be subject to verification by the Buyer upon re——— the items or, if the items are stored, within forty-five (45) days from time of submission of the list, and any necessary adjustment to correct the list submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Seller shall submit to the Buyer his termination claim, in the form and with certification prescribed by the Buyer. Such claim shall be submitted promptly but in no event later than —— year from the effective date of termination, unless one or more extensions in writing are granted by the Buyer upon request of the Seller made in writing within such one-year period or authorized extension thereof. However, if Buyer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such one-year period or extension thereof. Upon failure of the Seller to submit his termination —— within the time allowed, the Buyer may, subject to any review required by ERDA procedures in effect as of the date of execution of this order, determine, on the basis of information available to him, the amount, if any, due to the Seller by reason of the termination and shall thereupon pay to Seller the amount so determined.

SANDIA CORPORATION STANDARD TERMS AND CONDITIONS (EXHIBIT 1 TO CHARLES T. ROSS, JR. AFFIDAVIT (R. II)

A. The following Articles apply to this Contract unless specifically deleted, or except to the extent they are specifically supplemented or amended, in Section I.

ARTICLE A1—DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

(a) SANDIA—Sandia Corporation and Sandia Laboratories, operated by Sandia Corporation (both Sandia), a prime contractor to the United States Energy Research and Development Administration under Contract No. E(29-1)-789, as amended.

(b) GOVERNMENT—The United States of America.

(c) ERDA—The United States Energy Research and Development Administration (ERDA), the Administrator of Energy Research and Development, or any duly authorized representative of the Administrator including the Area Manager, Sandia Area Office, ERDA, except for the purpose of deciding an appeal under the article entitled "Disputes."

(d) CONTRACTOR—The Seller or the other party to the contract with Sandia.

(e) SUBCONTRACTS—Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

ARTICLE A2—CHANGES

The Sandia Contracting Representative may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for Sandia in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change

causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this Article must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: Provided, however, That the Sandia Contracting Representative, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Sandia Contracting Representative shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the Article of this contract entitled "Disputes." However, nothing in this Article shall excuse the Contractor from proceeding with the contract as changed.

ARTICLE A3—STOP WORK ORDER

(a) The Sandia Contracting Representative may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of ninety (90) days after the order is delivered to the Contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a Stop Work Order issued pursuant to this Article. Upon receipt of such an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of ninety (90) days after a stop

work order is delivered to the Contractor or within any extension of that period to which the parties shall have agreed, the Sandia Contracting Representative shall either—(i) cancel the stop work order, or (ii) terminate the work covered by such order as provided in the Article of this contract entitled "Termination for Convenience."

(b) If a stop work order issued under this Article is cancelled or the period of the order or any extension thereof expires, the Contractor shall resume work. An equitable adjustment shall be made in the delivery schedule, the contract price, or a combination thereof, and in any other provisions of the contract that may be affected, and the contract shall be modified in writing accordingly, if—(i) the stop work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract, and (ii) the Contractor asserts a claim for such adjustment within thirty (30) days after the end of the period of work stoppage; provided that, if the Sandia Contracting Representative decides the facts justify such action, he may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the Article of this contract entitled "Disputes."

(c) If a stop work order is not cancelled and the work covered by such order is terminated as provided by the Article of this contract entitled "Termination for Convenience," the reasonable costs resulting from the stop work order shall be allowed in arriving at the termination settlement.

ARTICLE A6—PAYMENTS

(a) The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided.

(b) For the purpose of computing discounts and other terms of payment, time will be computed from the date of receipt by Sandia of Contractor's correct invoices or the date of delivery of the supplies or services, whichever is later. Payment is deemed to be made for the purpose of earning the discount on the date of mailing of Sandia's checks.

ARTICLE A10—PROPERTY

(a) Title to material purchased hereunder shall pass directly from the Contractor to the Government at the designated delivery point.

(b) (1) (Applicable if this contract involves Government property furnished by Sandia to the Contractor herein referred to as "Sandia-furnished property.") The delivery schedules set forth in this contract are based upon the expectation that the Sandia-furnished property referred to in Section I of this contract will be delivered on or before the date or dates set forth in Section I. In the event that such Sandia-furnished property is not delivered to the Contractor by such time or times, the Sandia Contracting Representative shall, if requested by the Contractor, determine if any delay has been occasioned the Contractor thereby, and if so shall grant a reasonable extension of the time for completion of performance. Sandia shall not be liable to the Contractor for damages or loss of profit by reason of any delay in delivery of said Sandia-furnished property, except that in case of such delay, upon written request of the Contractor, an equitable adjustment shall be made in the delivery schedule of this contract, or price, or both, and in other contractual provisions affected thereby, in accordance with the procedures provided for in the Article entitled "Changes."

(2) (Applicable if this contract involves Contractor-acquired property.) In connection with its work under this contract, the Contractor shall, within the time or times specified in Section I, if any, acquire or manufac-

ture for the Government's account the property, such as special tooling, test equipment, and facilities, listed in Section I (herein referred to as "Contractor-acquired property.")

(c) Title to all Sandia-furnished or Contractor-acquired property shall remain in the Government. Title thereto shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall any such property, or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty. The Contractor shall maintain adequate property control records of such property consistent with good business practice and as may be prescribed by the Sandia Contracting Representative, and shall cause all such property to be clearly marked (if not so marked) to show that it is property of the Government.

(d) Unless otherwise authorized by the Sandia Contracting Representative, Sandia-furnished or Contractor-acquired property shall be used only for the performance of this contract.

(e) The Contractor shall, in accordance with sound industrial practice and without additional cost to Sandia or the Government, maintain in operating condition, repair, protect, and preserve such Sandia-furnished or Contractor-acquired property until disposed of by the Contractor in accordance with this Article. Should any replacement or repair of any such property become necessary during the term of this contract, for which the Contractor is not responsible under the provisions of this contract, the same shall be made by the Contractor at the direction of and for the account of Sandia, and the title thereto shall vest in the Government and any delay occasioned thereby shall be considered an excusable delay under this contract. Any replacement or repair of any such property for which the Contractor is responsible under the provisions of this contract shall be accomplished by the Contractor at his own expense.

* * * * *

(b) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the provisions of paragraph (a), the Contractor and any Subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such Contractor and Subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer, mechanic, apprentice, trainee, watchman, or guard employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of 8 hours or in excess of his standard workweek of 40 hours without payment of the overtime wages required by paragraph (a).

(c) Withholding for unpaid wages and liquidated damages. Sandia may withhold from the Contractor, any moneys payable on account of work performed by the Contractor or Subcontractor, such sums as Sandia determines to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) Subcontracts. The Contractor shall insert paragraphs (a) through (d) of this Article in all subcontracts, and shall require their inclusion in all subcontracts of any tier.

(e) Records. The Contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(A). Such records shall be preserved for 3 years from the completion of the contract.

ARTICLE A105—WALSH-HEALEY PUBLIC CONTRACTS ACT

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Contracts

Act, as amended (41 U.S. Code 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

ARTICLE A106—CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment except as provided by Public Law 89-176, September 10, 1965 (18 U.S.C. 4082(c)(2)) and Executive Order 11755, December 29, 1973.

ARTICLE A107—NOTICE OF LABOR DISPUTES

Whenever an actual or potential labor dispute is delaying or threatens to delay the performance of the work, the Contractor shall immediately notify the Sandia Contracting Representative in writing. Such notice shall include all relevant information concerning the dispute and its background.

ARTICLE A108—BUY AMERICAN ACT

(a) In acquiring end products, the Buy American Act (41 U.S. Code 10a-d) provides that the Government give preference to domestic source end products. For the purpose of this Article: (i) "Components" means those articles, materials, and supplies, which are directly incorporated in the end products; (ii) "End products" means those articles, materials and supplies, which are to be acquired under this contract for public use; and (iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the

components thereof which are mined, produced, or manufactured in the United States exceed 50 percent of the cost of all its components. For the purposes of this (a) (iii) (B), components of foreign origin of the same type or kind as the products referred to in (b) (ii) or (iii) of this Article shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products: (i) which are for use outside the United States; (ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality; (iii) as to which ERDA determines the domestic preference to be inconsistent with the public interest; or (iv) as to which ERDA determines the cost to the Government to be unreasonable. (The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954.)

ARTICLE A109—RENEGOTIATION

(a) This contract is subject to the Renegotiation Act of 1951 (50 U.S.C. App. 1211, et seq.), as amended, and to any subsequent act of Congress providing for the renegotiation of contracts. Nothing contained in this Article shall impose any renegotiation obligation with respect to this contract or any subcontract hereunder which is not imposed by an act of Congress heretofore or hereafter enacted. Subject to the foregoing this contract shall be deemed to contain all the provisions required by section 104 of the Renegotiation Act of 1951, and by any such other act, without subsequent contract amendment specifically incorporating such provisions.

(b) The Contractor agrees to insert the provisions of this Article, including this paragraph (b), in all subcontracts, as that term is defined in section 103g of the Renegotiation Act of 1951, as amended.

ARTICLE A110—UTILIZATION OF SMALL BUSINESS CONCERNS

(Applies if the amount of this contract exceeds $5,000.)

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

ARTICLE A111—UTILIZATION OF LABOR SURPLUS AREA CONCERNS

(Applies if the amount of this contract exceeds $5,000.)

(a) It is the policy of the Government to award contracts to labor surplus area concerns that (1) have been certified by the Secretary of Labor (hereafter referred to as certified-eligible concerns with first or second preferences) regarding the employment of a proportionate number of disadvantaged individuals and have agreed to perform substantially (i) in or near sections of concentrated unemployment or underemployment or in persistent or substantial labor surplus areas or (ii) in other areas of the United States, respectively, or (2) are noncertified concerns which have agreed to perform substantially in persistent or substantial labor surplus areas, where this can be done consistent with the efficient performance of the contract and at prices no higher than are obtainable elsewhere. The Contractor agrees to use its best efforts to place its subcontracts in accordance with this policy.

(b) In complying with paragraph (a) of this Article and with paragraph (b) of the Article of this contract entitled "Utilization of Small Business Concerns" the Contractor in placing its subcontracts shall observe the

following order of preference: (1) Certified-eligible concerns with a first preference which are also small business concerns; (2) Other certified-eligible concerns with a first preference; (3) Certified-eligible concerns with a second preference which are also small business concerns; (4) Other certified-eligible concerns with a second preference; (5) Persistent or substantial labor surplus area concerns which are also small business concerns; (6) Other persistent or substantial labor surplus area concerns; and (7) Small business concerns which are not labor surplus area concerns.

ARTICLE A112—DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement of the parties hereto shall be decided by the Area Manager, Sandia Area Office, ERDA, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to Sandia and the Contractor. The decision of the Area Manager shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Area Manager a written appeal addressed to ERDA. The decision of ERDA or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this Article, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the said Area Manager's decision.

(b) This "Disputes" article does not preclude consideration of law questions in connection with decisions

provided for in paragraph (a) above: Provided, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ARTICLE A113—COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE A114—OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE A115—EQUAL OPPORTUNITY

The following clause is applicable unless this contract is exempt under the rules, regulations, and relevant orders of the Secretary of Labor (41 CFR, Ch. 60).)

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor

will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Sandia Contracting Representative setting forth the provisions of this Equal Opportunity Article.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Sandia Contracting Representative, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity Article, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965 and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by ERDA and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Equal Opportunity Article of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each Subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as ERDA may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event the Contractor becomes involved in, or is threatened with, litigation with a Subcontractor or vendor as a result of such direction by ERDA, the Contractor may request the Government to enter into such litigation to protect the interests of the Government.

NOTE: Pursuant to paragraph (e) above, the Contractor shall file, and shall cause its subcontractors to file, complete and accurate reports required by the rules, regulations, and orders of the Secretary of Labor.

ARTICLE A116—ASSIGNMENT

This contract is assignable by Sandia to the Government or its designee. Any assignment by the Contractor of the work to be performed, in whole or in part, or of

any other interest hereunder without Sandia's written consent, except an assignment confined solely to moneys due or to become due, shall be void. It is expressly agreed that any such assignment of moneys shall be void to the extent that it attempts to impose upon Sandia obligations to the assignee additional to the payment of such moneys, or to preclude Sandia from dealing solely and directly with the Contractor in all matters pertaining hereto, including the negotiation of amendments or settlements of amounts due.

ARTICLE A117—RELEASES VOID

Sandia's and the Government's representatives shall not be required to waive or release any personal rights in connection with any visits to Contractor's or Subcontractor's premises and Contractor and Subcontractor agree that no such waiver or release shall be pleaded by Contractor or Subcontractor or by third persons in any action or proceeding.

ARTICLE A118—UNCLASSIFIED CONTRACT

(The provisions of this Article are not applicable if Article B1, SECURITY, is included in this contract.)

This contract is not classified; therefore, there is no expressed or implied approval for origination, transmission, or receipt of classified documents under this contract.

ARTICLE A119—COST ACCOUNTING STANDARDS

(Applies if (1) this contract is negotiated (as defined in paragraph (e) below), and (2) the amount of the contract exceeds $100,000, except where the price negotiated is based on (i) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (ii) prices set by law or regulation, and except where the contract is exempt from the requirement by reason of Sec. 331.30(b) of Title 4, Code of Federal Regulations.

(a) Unless the Cost Accounting Standards Board has prescribed rules or regulations exempting the Contractor or this contract from standards, rules, and regulations promulgated pursuant to 50 U.S.C. App. 2168 (P. L. 91-379, August 15, 1970), or other statutory authority, the Contractor, in connection with this contract shall:

(1) By submission of a Disclosure Statement, disclose in writing his cost accounting practices as required by regulations of the Cost Accounting Standards Board. The required disclosures must be made prior to contract award unless the Sandia Contracting Representative provides a written notice to the Contractor authorizing post-award submission in accordance with regulations of the Cost Accounting Standards Board. The practices disclosed for this contract shall be the same as the practices currently disclosed and applied on all other contracts and subcontracts being performed by the Contractor and which contain this Cost Accounting Standards Article. If the Contractor has marked the Disclosure Statement to indicate that it contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be submitted directly to the U.S. Energy Research and Development Administration, Sandia Area Office, P.O. Box 5400, Albuquerque, N.M. 87115. The Disclosure Statement will be protected and will not be released outside of the Government.

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EXHIBIT 22AA TO PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANTS' INTERROGATORIES
(Second Set) 2/7/77 (R.V.)

March 19, 1954

Honorable W. Sterling Cole
Chairman, Joint Committee on
Atomic Energy
Congress of the United States

Dear Mr. Cole:

I refer to your letter of December 23, 1953 to Mr. Strauss, inquiring as to action taken by the Commission to procure certain items directly and furnish them to its contractors. I attach a report by the Office of the General Counsel on this question. That report describes in some detail the situations in which such direct procurement actions have been taken. You will note that in each case the Commission would contend, even if no change in its procurement practices had been made, that the transaction was tax exempt under provisions of the Federal Constitution or of state law applicable to all agencies of the Federal Government. Thus, the action taken has served merely to eliminate legal doubts that might otherwise have been thought to exist as to the tax exempt status of the transaction. You will note also that in Ohio, where such action has principally occurred, the State will receive substantial tax revenues from the construction of the Portsmouth plant.

As the previous report of the General Counsel, attached to Mr. Strauss' letter of December 22, 1953, indicated, the Commission has endeavored to act in accordance both with the legislation of Congress intended to place AEC on the same footing as other federal agencies with respect to state and local taxes and with the desire of the Administration that it keep expenses to a minimum. I am in accord with the view expressed by the Office of

the General Counsel that the actions described in the report constitute appropriate measures, consistent with the action of Congress, to avoid litigation and reduce expenses.

I regret that pressure of other legislative matters has delayed preparation of this reply.

Sincerely yours,

K. D. NICHOLS
General Manager

Enclosure:

Report by the Office of the
General Counsel

Distribution:
Addressee—Orig. & 1
Chairman—1
Gen. Mgr.—1
Cong. Comm.—2
OGC—3
OROO (Ould)—1

Mar 19 1954

REPORT: Clarification of Certain Statements Concerning AEC Policy on State and Local Taxation.

REFERENCE: Letter dated December 23, 1953, from W. Sterling Cole, Chairman of the Joint Committee on Atomic Energy, and letter dated December 22, 1953, from Lewis L. Strauss to W. Sterling Cole.

The Chairman of the Joint Commission on Atomic Energy has requested further clarification with respect to that part of the General Manager's instructions of October 1, 1953, which directs Managers of Operations to procure materials directly and furnish them to contractors where such direct procurement would result in substantial savings without adverse effect on contractor relationships or on the AEC program or schedules.

As was indicated in the report attached to the letter to Mr. Cole of December 22, 1953, the action of the Congress in repealing the last sentence of section 9(b) of the Atomic Energy Act of 1946 was intended "to place the Atomic Energy Commission on a basis identical to that of the rest of the Federal Government with respect to" state and local taxation. Senate Report No. 694, 83rd Cong., 1st Sess., p. 1. Consistently with that purpose this Commission has authorized and directed its contractors to claim tax exemption in situations in which such exemption would be claimed by contractors of other Government agencies. As that report also points out, in certain instances this Commission has, since October 1, 1953, procured materials directly for use of its contractors in order to achieve efficiencies and economies, including tax savings.

The direct procurement action is consistent with policies and procedures established long before October 1, 1953. AEC's cost-type contracts and its procurement procedures contemplate that the Government may, and

in some instances shall, furnish materials for the use of the contractor. Contracts of other Government agencies contain similar provisions. See, for example, Department of Defense, Armed Services Procurement Regulations, Sec. XIII. AEC has for a long time, for reasons of efficiency and economy, followed the policy that requirements for its contractors should be met from available government sources if procurement from those sources is economically advantageous to the Government. Pursuant to this policy, contractors have been furnished with materials from Government stores, and have been authorized to place delivery orders against Government supply contracts entered into between the General Services Administration and suppliers. In addition, beginning more than a year prior to October 1, 1953, in order to achieve efficiency and economy in procuring certain items for the three gaseous diffusion plants at Oak Ridge, Tenn., Portsmouth, Ohio, and —cah, Ky. the Oak Ridge Operations Office has engaged in a sizeable program of centralized direct procurement. Direct procurement has also been used in cases, for example, in which the articles to be procured were articles of which a division or affiliate of the AEC contractor was a producer.

The decisions of the Supreme Court in *Alabama* v. *King and Boozer*, 314 U.S. 1 and *Kern Limerick Co.* v. *Scurlock*, No. 115, decided February 3, 1954, clearly contemplate that the United States may, if it desires, procure directly materials which are to be used by its contractors in the performance of their contracts. In the *Kern-Limerick* case the Supreme Court had before it an arrangement which has been used by the Navy Department in cost-type contracts since 1942, under which the contractor undertook to procure all items needed for the performance of the contract as agent for the United States. The Court held that the Navy was authorized to procure these items directly and furnish them to its contractor; that it could do this procurement through an agent; and that under the procedures adopted by the

Navy Department the United States was the purchaser and the purchase was constitutionally exempt from state taxation. It reached this result notwithstanding the fact that payment was initially made out of the contractor's own funds, subject to later reimbursement.

While the foregoing, I believe, is sufficient to indicate the basis and authority for the provision of the General Manager's instructions to which Mr. Cole's letter refers, it may be helpful, in addition, to describe the scope and nature of the principal direct procurement actions taken by this Commission since October 1, 1953. They have involved (1) new arrangements for direct procurement of certain items for the Portsmouth, Ohio, plant and (2) certain changes in the procedure for procuring various items already being directly procured by this Commission under its centralized procurement plan at Oak Ridge or purchased against Government Supply Schedules.

(1). It is estimated that the State of Ohio will receive, during fiscal years 1954 and 1955, approximately 4.6 million dollars in sales and use taxes on procurements of property by lump sum contractors and subcontractors for use in or in connection with the construction of the Portsmouth plant, the cost of which will be indirectly borne by AEC through payment of increased contract prices. This procurement would have been considered tax exempt under section 9(b) of the Act as it stood prior to the recent amendment. AEC does not question the tax liability of such contractors.

On purchases by our cost-type contractors for the Portsmouth plant, however, steps are being taken to litigate, before the Ohio Board of Tax Appeals, the issue of liability for Ohio sales and use taxes. This Commission and its cost-type contractors, with the concurrence of the Department of Justice, are taking the position that on such procurement the United States is the real purchaser, so that the legal incidence of the tax is on the United States and the transaction is exempt within the

rule stated in *Alabama* v. *King and Boozer*, 314 U.S. 1, and recently reaffirmed by the United States Supreme Court in *Kern-Limerick Co.* v. *Scurlock*, No. 115, discussed above. This position is based on the following features of the contractual arrangement:

a. The purchase agreements with the vendor provided that the Government acquired title to the property directly from the vendor and that the contracts of purchase were for the benefit of and are assignable to the Government, and contained numerous other provisions for the benefit of and establishing rights in the Government.

b. It was expressly understood between AEC and the contractor that he would use Government Money, advanced to him for this purpose and held in a special account, to pay the vendors for these purchases and would not use his own private funds. (It is doubtful whether any contractor handling a job the size of Portsmouth—over a billion dollars—either could, or would, have financed the operation in any other way.)

Alternatively, the Commission and its contractors will contend that if the Board of Tax Appeals rejects the view that the United States purchases directly from the vendor, then it should hold that the contractor is purchasing for resale to the United States and the sale is exempt under state law as a sale for resale. Reliance is also placed on a rule of the Ohio Tax Department granting an exemption on certain procurements by construction contractors who work under so-called "breakdown" or "time and materials" contracts. The Ohio authorities have not been willing to recognize that our cost-type contractors are entitled to an exemption under either of these rules.

While the Commission believes its position as to this procurement by cost-type contractors is strongly supported by the recent decision in the *Kern-Limerick* case

and other precedents, it has felt it advisable also to minimize the area of dispute by taking action since October 1 to arrange for direct procurement of approximately $100,000,000 of materials which will be used in and become a part of the Commission's Portsmouth facilities. This has been done by having Peter Kiewit Sons' Co. (the AEC management contractor for construction) assign its purchase orders over $50,000 to the Commission, in accordance with provisions of the purchase orders expressly permitting such assignments. The tax officials of the State of Ohio have been advised of this action and have indicated their agreement that no tax is due on these assigned transactions. The estimated sales and use tax on the proceurement actions so assigned would have been about 3 million dollars; an additional 2 to 3 million dollars of tax is involved in the pending litigation on the remaining Kiewet purchase order.

It should be emphasized that in the case of those purchase orders which have been assigned, it is AEC's contention, even without an assignment of the purchase orders, that the transaction through its cost-type contractor involved a purchase by the United States, because of the fact that the purchase was made with Government funds and title passed direct to the United States. The passage of title to the Government under these purchase orders of its cost-type contractors is not merely passage of a "security" title, but operates to make the property Government property in all respects. Thereafter, the use, control, and disposition of such property are governed by the same criteria, rules, and procedures as are applicable to any Government property furnished to a contractor in connection with work performed for AEC and the property may be, and sometimes is, made available to other contractors or used at other sites. The materials so procured include electric motors, transformers, switch gear and other electrical equipment, structural steel, miscellaneous iron, pipe and

fittings, pumps, condensers, fans, air grills, and refrigerator equipment.

(2). The other area in which a change in procurement practices has been made since October 1, 1953, also concerns the Oak Ridge, Portsmouth and Paducah plants and involves purchased in which the Government was already named as the purchaser on the fact of the documents. As has already been mentioned, for more than a year prior to October 1, 1953, the Oak Ridge Operations Office had undertaken a sizeable central procurement program in connection with the gaseous diffusion plant expansion. Such procurement was made by direct contract between AEC and the vendor. For administrative purposes, arrangements were made for the prime construction contractors at the three sites, and the Oak Ridge plant operator, Carbide and Carbon Chemicals Company, to participate directly in the administration of the purchase contracts and to handle payment of the invoices. This centralized procurement was undertaken for reasons of efficiency and economy unrelated to taxes, principally to facilitate coordinated scheduling of deliveries of similar items to different contractors at three different sites.

In addition, for some years cost-type contractors of the Oak Ridge Operations Office have been authorized, as an economy measure and by arrangement with GSA and other Federal agencies, to issue delivery orders against supply contracts entered into by the General Services Administration and other Federal agencies for the acquisition of property for the Government, and to handle directly the payment of invoices for property delivered. Finally, the Oak Ridge Operations Office has long procured directly miscellaneous products and articles needed in plant operations which are produced by other divisions or subsidiary corporations of the plant operating contractor; although once the contracts were made delegations were given to the contractor to schedule deliveries, receive the property and make payment. In

both situations the Government obtains title to the property directly from the vendors and payment to the vendor is made from Government funds advanced to the contractors for this purpose.

In all of these cases, where significant amounts of taxes may be involved, instructions have been issued by the Oak Ridge Operations Office recalling the delegation to the contractors concerned to make payment for property delivered, and payment is now made by AEC through checks issued by Treasury disbursing officers.

With respect to all of the above arrangements, it is AEC's contention that the purchase was by the United States even though payment had been made by a contractor, so that the transaction was exempt either under the Federal Constitution or under state law. The purpose in recalling the payment authority granted to the Oak Ridge contractors and providing for direct payment through AEC was to eliminate any possible argument as to the availability of the constitutional or statutory exemption. The dollar amount of procurement transactions under the AEC contracts and other Government sources of supply affected by this action presently stands at approximately $342,000,000. The types of property being acquired under these contracts are process equipment for installation in the AEC-owned plants in Oak Ridge, Paducah and Portsmouth, such as compressors, tube sheets, converter shells and heads, evaporators, valves, meters, pumps, generators, heat exchanges, PG pipe and heavy electrical equipment; and under the GSA and other agency contracts gasoline and miscellaneous items of supplies.

The maximum sales and use tax (Tennessee and Ohio) on the above procurement actions is estimated as of the order of 8 to 10 million dollars. The gasoline tax which might have been payable in the absence of the revisions in procurement practices is estimated at approximately $100,000 for the next twelve months.

The recent actions taken by the Oak Ridge Operations Office in the interest of avoiding litigation and eliminating doubt as to the availability of tax exemptions would appear to be consistent with AEC's previous practice of procuring items directly where greater efficiencies or economics could thereby be achieved. Those actions have been taken only after examination of the particular situations involved and determination by AEC that such results could be achieved, taking into consideration any increased administrative costs to AEC and without impairment of contractor relationships. We are advised that to date the actions described have not required the hiring of additional personnel by AEC and have resulted in little, if any, additional administrative expense to AEC. Certainly, any increased administrative cost is negligible compared with the tax savings to be achieved.

The foregoing discusses actions taken by Oak Ridge Operations with respect to Ohio, Tennessee and Kentucky procurements. It is understood that similar actions have not been taken at other AEC installations, either because existing tax liabilities and exemptions based on state law were not affected by the repeal of the last sentence of section 9(b), or because the state has no sales and use tax, or because the tax situation is as yet unclear, or because the volume of purchases did not appear to warrant such action.

CONGRESS OF THE UNITED STATES
JOINT COMMITTEE ON ATOMIC ENERGY

December 23, 1953

Atomic Energy Commission
1901 Constitution Avenue
Washington 25, D.C.
Attention: Mr. Lewis L. Strauss, Chairman

Gentlemen:

I have received your letter of December 22 and the memorandum by your General Counsel.

I am sure that we are in accord in our desire to place the atomic energy program into normal commercial channels as soon as possible. I have read with interest, and with some confusion your statement that the General Manager directed the Managers of Operations:

> ". . . to procure materials directly and furnish them to subcontractors . . . ."

It would seem to me that this method of proceeding is against the intent of Public Law 262. It was the understanding of this Committee that the additional expense necessitated by Public Law 262 was approved by the Administration in advance as a necessary price for restoring, in small part, normal Federal-State relationships in this field.

I would appreciate receiving additional clarification.

Sincerely yours,

/s/ Sterling Cole
STERLING COLE
Chairman

EXHIBIT 22Q TO PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANTS' INTERROGATORIES (SECOND SET) 2/7/77 (R.V)

GOVERNMENT PROCUREMENT AND CONTRACTING (PART 2)

HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES NINETY-FIRST CONGRESS FIRST SESSION ON H.R. 474 TO ESTABLISH A COMMISSION ON GOVERNMENT PROCUREMENT

MARCH 25, 26, AND 27, 1969

Printed for the use of the Committee on Government Operations

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1969

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Then you go into the shipping industry and the Maritime Administration, and it is costing us around $700 million a year in subsidies. The Government pays 55 percent of the construction cost and 75 percent of the operating costs of the merchant marine. You can go on down the line into any phase of industry, and while all you hear from them is private enterprise and get the Government out of business, they would all commit suicide tomorrow if the Government got out of subsidizing —financial suicide.

Mr. Horton, you may pontificate for a while now.

Mr. HORTON. Mr. Chairman, I do not have any questions of Mr. Ramey.

AEC CONTRACTORS AS AGENTS

Mr. ROBACK. I do.

Commissioner Ramey, the AEC is unique in that atomic energy poses the most sensitive issues of Government control. Yet the whole procurement function is more widely delegated to industry, you might say, than in any other defense field.

Does that make the operating contractor more an agent of the Government than, let's say, a prime contractor for the Defense Department?

Mr. RAMEY. I would say in many cases, this is probably true. However, I would not classify the overall relationships as one of "agency" in the legal sense.

Mr. ROBACK. But he is on your side of the table?

Mr. RAMEY. That is right. We consider it is what we call a "partnership" arrangement where the operating contractor is working closely with the AEC management people, both the technical people and the procurement people so far as the operating contractor's procurement is concerned. So that we believe that it is close to being an agent but is not legally so. Some of the early contracts, for example, included language that said the con-

tractor is an independent contractor. The courts have taken in various positions on the matter of contractor relationship. Some of the big Defense Department contracts, especially these so-called incentive type, seem to be a little more of an "arm's length" kind of thing where the contractor is, at least theoretically, undertaking some risgs, for which he hopes to make some additional money.

Mr. ROBACK. And as part of that risk, he is hired to use his best judgment and his management skills.

Mr. RAMEY. That is right.

Mr. ROBACK. And here, while you want to have the same thing in one sense, you cannot let the contractor too far away on the tether.

Mr. RAMEY. That is right. We are trying to get the background, the business experience of the industrial or university contractor, but we recognize and he recognizes that the Government is assuming the risks and so we stay pretty close together.

Mr. ROBACK. So does this require or does it come about that you have more close supervision, comparatively, than, in the defense fields, and not only more close supervision, but more approval responsibilities?

SPECIAL CONTRACTOR RELATIONSHIPS

Mr. ROBACK. Well, in this rather special relationship which you have with the operating contractors, namely, that they collectively operate all the major facilities and, perform all the major substantive functions for the Commission, with the exception of these research contracts that you mentioned—

Mr. RAMEY. And there are certain other activities I might want to mention, like construction activities. We reserve a good part of the direct construction to AEC. On utilities, we utilize, of course, the GSA contracts for electric service. Sometimes there are major components which AEC directly contracts for. And, of course, on these demonstration reactor projects, again we contract for them directly with major participants.

Mr. ROBACK. But in all these other areas, the fact that a contractor, not the Government, is doing the contracting in a large way exempts these agencies legally from all procurement laws and regulations.

Mr. RAMEY. Not from all, but from some.

Mr. ROBACK. Not from all, but in a large way, I say.

Mr. RAMEY. Yes; at least, with respect to the procurement statutes.

Mr. ROBACK. So when you say you follow the practice of competitive bidding, you mean you try to follow it in the spirit of the law, but there is no obligation legally on the operating contractor in the same sense that there might be on the contracting officer in the Government.

Mr. RAMEY. For these activities, that is correct. On construction, for example, where AEC is handling this directly, we follow advertising and the straight out Government competitive bidding procedures. That is the area where the whole concept of advertising and formal advertising, and so forth, more or less grew up. So in this respect, we are like the Government generally and in these other aspects, where the contractor is subcontracting for research and development or for equipment, this sort of thing, you are right, he is not legally subject to all of the Government's procurement regulations.

Mr. ROBACK. Well, have you sorted out in your study which he is legally subject to and which he is not?

Mr. RAMEY. Yes, we have.

Mr. ROBACK. Will you supply a convenient summary or listing of that?

Mr. RAMEY. We have done this in the past and we are redoing it now as a result of this study group's review and report. We will be glad to provide you with the information as soon as it is finalized.

(See p. 462.)

COMPETITION IN SUBCONTRACTS

Mr. ROBACK. What information do you have—this question has been asked in the course of these hearings—

on the extent of advertised as against negotiated procurement carried on by your operating contractors?

Do you have any summary figures which would indicate the extent to which, for example, you have competition or advertised competition?

• • • • •

STIPULATION CONCERNING MEMORANDUM BY W. NOEL KEYES, (R.I-146-148)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 75-418

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF NEW MEXICO, ET AL., DEFENDANTS

STIPULATION

The parties hereby stipulate to the following matters of fact in the above-entitled cause:

1. In the course of preparing answers to defendant's interrogatories filed herein on July 26, 1967, counsel for plaintiff found in the files of the Office of Chief Counsel, Albuquerque Operations Office, ERDA, a document which was identified in plaintiff's answer to interrogatory 106, filed herein on February 7, 1966 (item (2), page 60), as "Memo Route Slip and attached memorandum dated November 13, 1959, from W. Noel Keyes, Counsel, Kansas City Area Office, AEC, to Chalmers C. King, Chief Counsel, Albuquerque Operations Office, AEC, subject: 'Ramifications of Utilization and Characterization of Bendix as an agent for the United States in its Activities under Contract 613.'" The Kansas City Area Office is a subordinate field office to the Albuquerque Operations Office. The document consists of 16 pages of what the United States characterizes as 'impressions, opinions and conclusions of the author on the stated subject", and which New Mexico characterizes as "legal analysis on the stated subject." The document nowhere states that it is an official statement of AEC legal or contracting policy.

2. Plaintiff asserted in its answer to interrogatory 106 and continues to assert that the document identified in

paragraph 1. above is privileged and not subject to production or disclosure pursuant to the Federal Rules of Civil Procedure in this litigation. By letter of March 11, 1977, to plaintiff's ccounsel, defendants' counsel asked if he could review certain documents identified in plaintiff's answers to interrogatories 18c and 106, as to which plaintiff had asserted a privilege, including the document referred to in paragraph 1, above, in order to determine "whether securing these documents would be of value or whether it would be a pointless exercise." By letter of March 13, 1977, counsel for ERDA responded on behalf of plaintiff that the documents could be reviewed by defendants' counsel at ERDA's offices in Albuquerque, New Mexico, subject to the understanding that "the Government is asserting a privilege with respect to these documents and that our making them available for your examination does not in any way constitute a waiver of privilege asserted."

3. In accordance with the understandings stated in paragraph 2., defendants' counsel reviewed all of the documents in question on March 24, 1977. By letter of May 4, 1977, defendants' counsel asked if plaintiff's counsel would stipulate to the existence of a very limited portion of the document identified in paragraph 1. In order to save both parties and the court the time and expense which might otherwise result from proceedings which would be required for the court to hear and determine the applicability and extent of the privilege previously asserted, plaintiff is willing to stipulate to the existence of such limited portion of such document, subject to the understanding that no claim of privilege previously asserted with respect to remaining portions of such document is thereby waived or relinquished by plaintiff.

4. The document identified in paragraph 1. contains the following statement by the author:

"The OR [Oak Ridge Operations Office, AEC] prime contract (1956 amendment) does not state that Union Carbide is an 'agent' of the U.S. (AEC Washington being adverse to use of the term in prime contracts at the time), but does specify that the corporation will manage in accordance with directives the AEC may give and procure when required 'on behalf of' the AEC."

The memorandum cites no authority or support for the above-quoted conclusion of the author.

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EXHIBIT 7

DIVISION OF CONTRACTS

REPORT OF STUDY OF ADMINISTRATION OF PROCUREMENT, ATOMIC ENERGY COMMISSION, 11/68, EXHIBIT 7 TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT (R. III)

REPORT OF STUDY OF ADMINISTRATION OF PROCUREMENT AND CONTRACTING PROCEDURES OF MAJOR COST-TYPE CONTRACTORS

ATOMIC ENERGY COMMISSION

November 1968

* * * * *

1. It is not intended that this Volume be applied directly to contractor personnel engaged in procurement. Contractor personnel are governed by (1) applicable contract provisions and (2) procurement procedures established by the contractor and approved by AEC. It is intended, however, that the procurement practices and procedures as set forth in this Volume be made available to contractors as illustrative of the methods used by the AEC and for their consideration in the development or revision of their own written procurement practices and procedures. (Sec. 9101-16 AEC Procurement Manual, dated October 25, 1954.)

2. The FPR and AECPR shall be made available to the cost-type contractors that construct and operate AEC plants and laboratories as illustrative of the policies, practices, and procedures used by the AEC, for their consideration in the development or revision of their own written procurement practices and procedures. Cost-type contractors are governed by (1) applicable contract provisions and (2) procurement policies,

practices and procedures established by the contractor and approved by AEC. The FPR and AECPR will be employed by AEC in its review and approval of cost-type contractor procurement policies, practices and procedures. (9-1.104 (b) AECPR, dated July 1960.)

The Study Group was informed by the AEC that other statements had been issued to the effect that various policies and procedures included in procurement manual chapters or the AECPR should be made applicable to cost-type contractor procurement to the "maximum extent practicable" and "greatest possible extent," and that "managers shall assure that. . .", etc.

As a result, some AEC field offices believed themselves compelled to exert a maximum effort to bring major AEC cost-type contractors' procurement procedures into conformity with the FPR and AECPR. Also contributing to this belief was a statement by the Comptroller General in a letter of May 14, 1964 (B-152946), to the Chairman, AEC, that appropriate steps should be taken to ensure that future procurement by AEC cost-type contractors be conducted under procedures conforming, to the greatest extent practicable, to the Government's bidding standards.

In August 1964 the AEC undertook a major review of its operating policies and practices, including how closely the AEC should require its major prime contractors to follow AECPR and FPR in their procurement procedures. The staff committee, in its attempts to clarify the degree to which the FPR and AECPR should be applicable to cost-type contractor procurement, considered four possible alternatives:

(1) Make little change in the then existing system except to explain the meaning of such terms as "maximum extent practicable" and "greatest extent feasible."

(2) Consider the contractors as agents of the Government and require that they follow strictly the FPR and AECPR in their procurement activities.

(3) Completely eliminate from the AECPR all reference to their applicability to contractors, thereby clarifying that AECPR and FPR apply only to direct AEC procurement. The subcontract and purchase-order clauses of prime contracts would include a statement of the basic procurement policies to be followed by the contractor.

(4) Issue a new AECPR (Subpart 9-1.52, Procurement by Cost-Type Contractors) which would replace all previous general guidance concerning the applicability of the FPRs and AECPRs to cost-type contractor activity. In addition, identify specific provisions in the FPR and AECPR which the contracting officer is required to bring to the attention of cost-type contractors as constituting areas which require "appropriate treatment" in the development of statements of contractor procurement practices.

The last of the above alternatives was adopted in May 1965 in an attempt to eliminate the confusion previously experienced as a result of such phrases as "to the maximum extent practicable" and "to the fullest extent practical." Consistent with the objective of retaining contractor flexibility the AEC's action was apparently intended to reduce the possibility of contractors' being held to the same precise procedural requirements as are stipulated for direct AEC procurement. However, this intent was not made clear in the transformation of the policy statement into procurement regulation language. In addition, the "appropriate treatment" concept as it is being interpreted and applied by certain AEC Field Offices results in an inflexibility that is not consistent with this intent.

The lack of clear understanding of what was intended by "appropriate treatment" became apparent to AEC Headquarters. Commissioner James T. Ramey, in an address to a meeting of the AEC Operations Office Managers in March 1967, stated:

EXHIBIT 22-L TO PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANTS' INTERROGATORIES (SECOND SET) 7/7/77 (R.V)

UNITED STATES ATOMIC ENERGY COMMISSION

Ninth Semiannual Report

of the

ATOMIC ENERGY COMMISSION

[SEAL]

January 1951

UNITED STATES GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C.

* * * * *

III

ADMINISTRATION OF ATOMIC ENERGY CONTRACTS

To administer the contracts through which the various atomic energy operations are carried out, the Atomic Energy Commission some times has had to find new ways for Government and industry to work together, and to develop management devices not previously used in Government programs.

This is more generally true of cost-reimbursement contracts, but even in administering lump-sum and unit-price contracts, AEC has responsibilities not ordinarily found when contractors undertake to provide specified suppliers or services to the Government at a fixed price. The descriptions of contract provisions and devices in the previous chapter underscored some of these: maintenance of security protection of workers' health, and the public against special hazards and accountability for atomic energy materials.

Where contracts are for operating facilities in the fissionable materials production chain, AEC must closely schedule output and take every necessary precaution against delay of work. The unit-price production contracts, found in the feed materials operations call for periodic redetermination of price (p. 45), and AEC must therefore review costs of such contractors to an extent not usually necessary in fixed-price contracting.

Cost-Reimbursement Contracts

It is in the administration of cost-reimbursement contracts, however, that the management problems most characteristic of the atomic energy program are met with. The firms operating large Government-owned production plants, carrying on extensive development projects, and undertaking urgent construction jobs, work in close day-by-day cooperation with the Commission and its staff. They have been selected for their competence, and the Government is contracting with them not only for technical ability but for managerial ability as well. The working relationships between the Commission and its operating contractors resemble in some aspects those between industrial companies and their branch offices. The contractor undertakes to carry on an extensive operation; the Commission establishes the objectives and makes the decisions required to fit the operation into the national program, and exercises the controls necessary to assure security, safety, desirable personnel administration, and prudent use of the public funds.

Of the many administrative innovations required to make possible this kind of relationship between a Government agency and a number of industrial concerns, those in the field of finance are fundamental.

AEC Finance

The financial procedures in use in the atomic energy enterprise in 1947 when the Commission took office were

the traditional Government system employed during the war emergency and were not specifically designed for industrial operations like the atomic energy program.

The record-keeping practices and audit prodecudes, in line with Government requirements, were intended primarily to provide the Government with justification of the cash expenditures under their contracts, item by item. These methods did not provide the up-to-date meaningful records of costs and the adequate basis for financial control of property so essential in the management of industry. The general accounts did not reflect the difference between capital and operating expenditures. They did not recognize the existence of such items as year-end accruals, inventories, and other factors necessary for preparing meaningful financial reports. They were not adapted to development of the accounting data necessary to provide the essential basis for sound management.

The customary procedure in the audit of certain contracts was resulting in a triple item-by-item voucher check—first by the contractors' employees, then by AEC staff, and finally by auditors of the General Accounting Office. The real purpose of an audit was lost in a mass of papers. Instead of giving the entire operation a critical review for general conformity with the purposes of the contract and with generally accepted standards for internal control and good accounting practices, the audit consisted primarily of a recalculation of items supporting contractors' expenditures. The sheer volume of paper work incident to the detailed pre-audit of reimbursements to contractors caused irritating delays. Reconciliations of contractors' records with those ofg AEC were unnecessarily difficult.

Cost of the Work the Basis for Accounting

In developing a system better suited to its needs, AEC has had the support of the Congress and the Bureau of the Budget, the General Accounting Office, and the Treasury Department. By July 1948, AEC had developed and

was beginning installation of accounting and financing systems designed to fit its Government-contractor operations with all their industrial ramifications. By the spring of 1949, enough accounting data were available to permit AEC to draw up a budget request for proposed fiscal year 1951 activities in terms of the costs of performing the work to be done; that is, it had what the Hoover Commission has designated a "performance" budget, based on costs by functions rather than simply on the cash expenditures required. AEC in 1949 recast its 1950 budget in terms of the costs of the activities and has now had a complete year of experience with the cost-based performance budget.

A report on the accounting support of the budget of the various Government agencies, prepared by special survey teams at the request of the Hoover Appropriations Committee, contains the following AEC system:

> Except for agencies under the Government Corporation Control Act the AEC was the first Federal agency to adopt both an industrial-type accouning system and the cost-based performance for all of its operations. In view of the increasing interest in the use of industrial accounting principles for Government agencies, it should be pointed out that the Commission possesses two of the essentials without which the full benefits of such a system cannot be realized; appreciation by management of the value of a good accounting system, and recognition of the need for an adequate accounting organization manned by qualified personnel. In the installation of the new system, which began in 1948, AEC has had the active cooperation of the GAO-Treasury-Budget Bureau Joint Accounting Program. The accounting principles employed have been approved by the Comptroller General.

The accounting is well integrated with budgetary preparation and execution. The activity classification and the cost accounting records and reports together constitute an effective tool for the financial and general management of operations. Its usefulness should increase as AEC refines its systems and gains experience in their use.

"Integrated" Contractors

The basic concept that has made possible the development of such a system in a contractor-operated Government enterprise is that of the 'integrated" contractor. For accounting purposes, major cost-type contractors are treated as though they were branch offices and the AEC the home office. Under this arrangement AEC generally advances funds to its major cost-type contractors and then holds them responsible for a proper accounting. The contractors' financial and accounting operations under AEC contracts are required to be clearly separated and departmentalized from their other activities. The contractors maintain "branch" books of account and internal controls for AEC operations that are in conformity with generally accepted accounting principles and approved by the Commission. Contractors' accounts thus become an integral part of the AEC accounting system.

The contractor submits comprehensive monthly financial statements to AEC showing the financial results of contract operations. AEC periodically conducts examinations of the contractors' accounts and procedures for work under the AEC contracts, similar to the examinations performed by public accountants in the certification of financial statements. The result is to eliminate duplication of audit work and serious delays in reimbursement to contractors.

AEC's major cost-reimbursed operating contractors and most large contractors for development work are "integrated" in this way. Examples are the Carbide &

Carbon Chemicals Division of the Union Carbide & Carbon Corp., the Nucleonics Department of the General Electric Co., and the Atomic Power Division of the Westinghouse Electric Corp. The salient points concerning accounting and financing under one of these AEC contracts are as follows:

a) Contract operations are financed from funds advanced to this contractor by the Commission and deposited in a special bank account.

b) Payments from these funds are audited periodically by AEC.

c) A separate and distinct set of accounts is set up and maintained to provide detailed data both by operating units of the contractor's organization and by AEC activities. Thus, the contractor and AEC can consolidate data as needed by each with comparable data for other operations.

d) Contractors' methods of handling payrolls, procurement, and stores have been adopted in general, with only slight modification to meet AEC requirements.

e) The contractor accounts for all funds, property, and facilities furnished to the activity. Accounts are audited by AEC and the General Accounting Office.

f) Periodic and special financial and operating reports are available to provide the basis for management and budgetary decisions.

Nonintegrated Accounts

There are numerous cost contractors whose accounts are not integrated with those of AEC, generally those with contracts involving relatively small sums of money or short periods of time. Even some large cost-type construction contracts, because of their limited duration, are not accounted for on an integrated basis. In such cases,

AEC reviews the contractor's accounting procedures in advance to assure that they will provide the cost data necessary for the maintenance of AEC accounts.

AUDITING

The installation of a modern industrial-type accounting system with provisions for internal controls made necessary the adoption of modern auditing techniques patterned after the methods of the public accounting profession. The primary aims of this type of examination are to see that funds and property are adequately protected by systems of internal controls and to establish the integrity of the financial statements. The audit includes the examination and verification of assets, liabilities, income, expenses, and cost distributions. Supporting documents are checked only to the extent necessary to determine the adequacy and accuracy of the general records. The accounting and internal control systems are reviewed to determine whether they are adequate to provide reasonable safeguards over assets, and furnish accurate and reliable information. The major improvement in the over-all audit program represents another instance in which AEC has adapted commercial methods to its operations.

Three Phases of the Audit

Where the accounts of a contractor are integrated with the AEC accounting system, the audit by AEC generally has three phases. A reimbursement audit is performed primarily to verify the contractors' net expenditures for approval of reimbursement or recoupment vouchers. Interim examinations are made from time to time during the year to test the adequacy of accounting records and internal controls. These examinations are a part of a comprehensive audit customarily completed once a year to verify the balance sheet and operating statements of the contractor.

Examinations and reviews independent of the comprehensive audit are made of financial operations under the various provisions of all contracts. In addition to verifying the correctness of the related financial transactions, these reviews provide valuable information to management and reveal ways of improving procedures and tightening controls.

The audit branches in operations offices are under the administration of the directors of finance and are independent of the accounting branches. Auditors from the Washington Office conduct on-the-site reviews of operations office audits and also review the copies of audit reports sent to the AEC controller.

GAO Audits

The General Accounting Office has cooperated with AEC in all of its auditing problems. In accordance with an agreement with the Comptroller General in October 1947, the GAO Audit Division has a staff stationed at each major AEC site. Since most contractors' records are now examined at the site by both AEC and GAO, the problem of duplicate records is largely eliminated. Both the contractors' records and the AEC audit reports and working papers are available at all times to the GAO aduitors. The GAO Corporation Audits Division is now starting a comprehensive audit of AEC accounts.

Accounting and Contract Administration

The AEC accounts have been established in the exact pattern of the work to be done throughout the enterprise; that is, the divisions and subdivisions of the budget and reporting classification are the same as the divisions and subdivisions of the operating program. Thus the making of the budget (estimation of future costs) is inseparable from program planning, and the accrual and periodic reporting of costs incurred is the basis for progress reporting as the program is carried out.

The budgeting and accounting systems provide one of the means through which AEC and its contractors jointly plan the jobs ahead, dividing and subdividing the major objectives into specific activities for which cost estimates are prepared. Similarly, in the execution of the programs, the contractors' periodic cost reports, along with their reports of physical work accomplished, make possible the continual measurement both of work done in relation to schedule and costs in relation to estimates. At the same time these reports provide the basis for planning the work ahead.

Contract Administration

Underlying the relationship of AEC to its major cost-reimbursed contractors—whether they be contractors for plant operation, laboratory operation, development, or construction—there are certain mutually recognized principles growing out of AEC's basic policy for contractor operation and method of selecting contractors. Briefly, they are:

a) The contractor recognizes that the AEC is responsible under the law for the conduct of the atomic energy program.

PLAINTIFF'S ANSWER TO INTERROGATORY 9, PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANTS' INTERROGATORIES (SECOND SET) 2/7/77 R.IV)

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9. As to ZIA, LACI and Sandia, state whether it is your contention that the contractor is an agent of the United States:

a. For all functions under its contract;
b. For some functions under its contract;
c. For no functions under its contract.

SUPPLEMENTAL ANSWER: Plaintiff's original answer to interrogatory number 9 fully explains plaintiff's contentions in this litigation with respect to the "agent" status of its management contractors. It is plaintiff's position that no further answer is required under FRCP Rule 33. However, it is plaintiff's desire to explain its position on all issues to the fullest extent possible, and plaintiff will endeavor to do so on the subject of interrogatory number 9 in this supplemental answer. This endeavor is made difficult by the fact that the interrogatory does not explain what defendants consider to be "functions under" the contracts or enumerate any such "functions." Nor does the interrogatory define the term "agent," which term, like the related terms "servant" and "independent contractor," has been difficult for authorities in the field of agency law to define with precision.

Traditional legal terminology in the field of agency law was fully developed before the emergence of the AEC's management contract concept in the 1940's. Therefore, it is understandable that the relationship contemplated by the management contract concept is not always accurately or completely described by the imprecise labels of the traditional terminology.

In this supplemental answer, plaintiff has taken into account the following authoritative statements with respect to the term "agent" and other related terminology of the traditional law of agency:

"Because of their brevity, definitions are more or less incomplete and inaccurate." (Seavey, *Law of Agency* § 1 (1964).)

"The brevity of a definition necessarily makes it an incomplete and inaccurate statement." (Restatement of Agency (Second), Introductory Note to Topic 1, Definitions.)

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." (Restatement of Agency (Second) § 1.)

"It is also generally recognized that the relationship of principal and agent may arise by operation of law." 3 Am. Jur.2d Agency § 19.

"The agency relation exists in order to enable a person to utilize the services of others and thereby to accomplish what he could not achieve alone." (Seavey, *Law of Agency* § 2 (1964).)

"This power is the characteristic result of the agency relation—the ability of the agent to subject the principal to personal liability and to create rights in his favor." (Seavey, *Law of Agency* § 3 (1964).)

"A servant is an agent who agrees to devote his time to his employer's business or family affairs and whose physical conduct, in the scope of employment, the employer normally has a right to control. As with all brief statements of rules, this statement only approximates accuracy. It is sometimes said that the right to control his physical activities is the test; while this is important, it is not always essential." (Seavey, *Law of Agency* § 6 (1964).)

"For agency purposes, any one who acts for, or contracts with, the principal other than as a servant, is

> an independent contractor. The category includes agents who are authorized to make contracts for the principal and also persons who are not agents but who have agreed to do things or accomplish results which the principal desires, with or without pay. In other words, there are two kinds of independent contractors—those who are agents and those who are not." (Seavey, *Law of Agency* § 6 (1964).)
>
> "Independent contractor' is used as a term to indicate someone employed but who is not a servant of the employer. As stated in Section 6, while the term is antithetical to the term servant, all agents except servants fall within its meaning. The distinction between agents who are servants and those who are independent contractors is important only in cases involving the liability of the employer for the physical acts of the one employed." (Seavey, *Law of Agency* § 10 (1964).)

As stated in plaintiff's original response to interrogatory 10, the relationship between ERDA and its management contractors "contain elements of the master-servant, principal-agent, and principal-independent contractor relationships." A given "function under" the contract, whatever the term entails, will probably contain elements of more than one of the relationships, as defined, with no real precision, in the terminology of the traditional law of agency.

The basic reason underlying AEC's use of management contractors is the same reason which underlies the typical principal-agent relationship. As stated in the legislative history of the Atomic Energy Act of 1946, the Act "permits management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry." (S. Rept. 1211, 79 Cong. 2d Sess. 15 (1946). See Exhibit 22-L at p. 39, Exhibit 22-P at p. 70 and Exhibit 22-AI.) Through management contractors, AEC and ERDA have not

merely purchased goods and services, but have carried out their own functions as Government agencies under the Atomic Energy Act.

The term "independent contractor" is also an accurate description of some aspects of the relationship. ERDA and AEC have not undertaken to direct the details of day-to-day operation, which would be contrary to the management contract philosophy. Instead, ERDA directs the general areas of work to be pursued and the results to be obtained. There are "functions," however, in which the term "servant," although imprecise, accurately describes aspects of the legal relationship between ERDA and one of its management contractors (e.g., the protection and safeguarding of Government property and classified material). There are other functions where "independent contractor" is a more appropriate label than "servant."

Regardless of whether a management contractor is predominantly a "servant" or predominantly an "independent contractor" for a given "function under" the contract, an essential aspect of agency is always present. This essential element of agency is the ability or power of the management contractor to create obligations of the Government, payable directly from Government funds. This power or ability has been described as the "characteristic result of the agency relation." (Seavey, *Law of Agency, supra.*) This essential element of agency is present with respect to *all* functions under the contract which ultimately result in the incurrence of obligations of third parties and the making of payments to obligees from Government funds. Thus, while the management contractor may be an "independent contractor," rather than a "servant" for a given "function under" the contract (e.g., directing the details of day-to-day research or maintenance operations and the hiring and direct supervision of employees), the management contractor is also properly labeled "agent" for these functions to the extent that they result in the incurrence of obligations

(e.g, the salaries of employees) payable directly from Government funds.

With respect to the "function" of procurement of tangible personal property, there are additional indicia of agency present. Not only is the Government's money used and a Government liability created when the purchase order is issued, but also, title and ownership of the property pass directly to the Government. Furthermore, such purchases are subject to prior approval of ERDA, are made in accordance with procurement procedures approved by ERDA, and are subject to certain specified provisions of the Federal Procurement Regulations and ERDA Procurement Regulations.

On the basis of the foregoing, plaintiff responds to the interrogatory by stating that the contractors have the essential attributes of "agents" with respect to all "functions under" the contracts which result in the expenditure of Govenment funds in furtherance of Government operations in Government facilities under their respective contracts.

Plaintiff admits that the basic contract documents at issue in this case do not use the term "agent" to describe the relationship between ERDA and its management contractors. Plaintiff contends that "agent" is an accurate description of the relationship to the extent stated above. However, plaintiff will contend that the real issues in this case—whether the Government is the purchaser and the owner of the funds used in operations—can be

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PLAINTIFF'S ANSWER TO DEFENDANT'S INTERROGATORY 10, 8/31/76 (R. IV)

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10. If your answer is that one or more of the contractors is an agent of the United States only "for some functions under its contract", state with particularity all functions for which such contractor(s) is not an agent and the extent and limits of such functions.

ANSWER: Virtually all functions performed by ERDA management contractors take on some aspects of "agency" because all such functions are devoted exclusively to the execution of Government programs in Government-owned facilities with all costs and expenses paid for directly from Governme.t funds. The term "agent," however, is an imprecise term with a variety of attributes and legal consequences flowing from its use, depending and the context. In the general context of an AEC management contract, plaintiff contends that the following is an accurate statement:

> "The exact legal relationship under the management contract concept is difficult to define in traditional legal terminology. The AEC-management contractor relationship is unique. It contains elements of the master-servant, principal-agent, and principal-independent contractor relationships. These ordinary legal classifications, however, are inadequate to identify accurately the relationship existing under the long-term arrangements utilized for conducting AEC's operations and have caused problems in a variety of legal areas. . . .
>
> "In general, there was no preconceived position as to what the legal relationship should be, or what either the tax or other legal consequences might be. The legal questions generated have been the natural consequences of the different interests affected by particular circumstances or actions, political considera-

tions, and the ingenuity of lawyers." Hiestand and Florsheim, *The AEC Management Contract Concept*, 29 Fed. B.J. 67, 75, 78 (1969).

Plaintiff admits that it has been argued on occasion that management contractors are "independent contractors" so that negligence on the part of contractor employees should not provide a basis for liability of the Government under the Federal Tort Claims Act, 28 U.S.C.A. §§ 1364(b), 2671, *et seq.* Plaintiff denies that "agent" and "independent contractor" are mutually exclusive terms. Plaintiff admits that employees of management contractors are not Government employees.

11. As to contracts between ERDA/AEC and Western, Zia, LACI or Sandia at any time between 1946 and the present time, state all instances in which any such contracts, or documents in force during the term of such contract, explicitly designated a contractor as an "agent" of the government in any way, empowered a contractor to act "on behalf of" or "for the account of the government or "bind the government in contract" in any way, or stated that the government "deemed itself bound by actions of the contractor" in any way, or "would guarantee payment to a supplier of the contractor" in any way or utilized language equivalent to that set out in quotations marks in this * * *

ANSWER TO INTERROGATORY 10, PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANTS' INTERROGATORIES (SECOND SET) 2/7/77 (R. IV)

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8. State whether it is your contention that Zia, LACI or Sandia are "instrumentalities" of the United States as that term is used by the Supreme Court in *United States* v. *Boyd*, 378 U.S. 39 (1964). If your answer is in the affirmative, state as to each contractor for whom a claim of instrumentality is made,

a. The names and occupational affiliation of each member of the contractor's board of directors and whether such contractor's board of directors includes officers or employees of the United States;

b. Whether such contractor's officers include officers or employees of the United States;

c. Whether such contractor is chartered by Congress;

d. All ways in which such contractor differs in structure, function and affiliation with ERDA from the contractor in the *Boyd* case;

e. The names of the persons or entities holding each contractor's shares and the number of shares each person or entity holds. *SUPPLEMENTAL ANSWER*: For purposes of this supplemental answer, the interrogatory is, in accordance with plaintiff's letter of September 24, 1976, considered a request for an admission "that the contractors [Zia, LACI, and Sandia] are not 'instrumentalities' within the meaning of *Department of Employment* v. *United States*, 385 U.S. 355 (1966)."

Plaintiff admits that Zia, LACI and Sandia do not meet all of the criteria for an "instrumentality" which were enumerated by the Supreme Court in *Department of Employment* v. *United States*, 385 U.S. 355, at page 359. However, plaintiff contends that ERDA has a relationship with Sandia Corporation which is unique among management contractors in light of the matters

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set forth in paragraphs 2 and 3 of the Ross affidavit and in Articles I, II, III, V and Appendix A of Contract AT(29-1)-789, Exhibit 3 to the Roser affidavit, all of which were submitted in support of plaintiff's motion for summary judgment. Plaintiff contends that this special relationship, though not strictly meeting the criteria of "instrumentality" in *Department of Employment*, is closely akin to an "instrumentality" type of relationship in light of those special aspects of the ERDA-Western-Sandia relationship to which reference has been made herein and in plaintiff's original answer. Plaintiff contends that these "instrumentality" features, while not essential for plaintiff to prevail, do place Sandia in a special category with respect to the issues raised in this litigation.

EXHIBIT 114-A TO PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANTS' INTERROGATORIES (SECOND SET) 2/7/77 (R.V)

United States Atomic Energy Commission

FIFTH SEMIANNUAL REPORT OF THE ATOMIC ENERGY COMMISSION

January 1949

UNITED STATES GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C. — 1949

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FINANCE

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ACCOUNTING AND AUDITING METHODS

In wartime, in the field of atomic energy, many unusual arrangements were utilized. One of the most difficult tasks facing the Commission was to obtain a clear picture of those arrangements in order to have the background necessary for sound decisions on accounting and methods of handling funds. In the fall of 1947, the Commission decided to employ public accounting firms, under contract, to review and evaluate accounting practices under typical contracts taken over from the Manhattan project.

REVIEW OF ACCOUNTING AND AUDITING METHODS

After consultation with the Comptroller General, the Commission contracted with the following public accounting firms for the review:

Haskins & Sells.
Lybrand, Ross Bros. & Montgomery.
Scovell, Wellington & Company.
Arthur Andersen & Company.
Touche, Niven, Bailey & Smart.

Each firm was assigned one of the five typical contracts selected for review. These contracts represented a cross section of Commission activity, covering town management, research, plant construction, and production. The public accountants reviewed the accounts and records of both the contractor and the Government under the selected contracts. Each firm worked independently of the others, and each made a separate report of its findings.

Extensive Revisions Necessary

Before the end of January 1948, the Commission had received the reports of the accounting firms, covering the accounting policies, standards, and procedures prevailing under the various contractual arrangements reviewed. The accounting firms had worked on different types of contracts, yet their findings had a similarity that left no doubt that extensive revisions were necessary before the accounting records and procedures and the methods of internal control instituted in wartime could be considered adequate for the Commission's long-term peacetime conditions of operation.

The record-keeping practices and audit procedures that the contractors had previously followed were primarily designed to justify their expenditures to the Government, item by item. But these methods did not serve the functions so essential in the industrial and commercial world, of providing up-to-date meaningful records of costs and controls of property. Changes were needed to eliminate duplication of audit work and records, to speed up reimbursement of contractors, and to arrive at complete and realistic operating statements.

The accountants' reports confirmed rather completely the opinions developed by the Commission's staff, that the only practical solution to the accounting problems lay in a fundamental departure from the conventional Government accounting concepts and practices.

REVISION OF ACCOUNTING AND AUDITING METHODS

Government agencies generally have considered that the Government's accounting begins when the Government disburses funds. Their general practice when operating through private contractors on a reimbursable-cost basis, has been to record the initial sums paid such contractors as advances and to reflect costs in the Government's accounts only when contractors' expenditures have been audited and reimbursed by the Government. This practice has two basic weaknesses in the accounting for contract activities of the nature of the atomic energy program:

(1) A considerable lag in time exists between the dates when the contractor incurs costs and when the Government accounts record the expenditures.

(2) It is extremely difficult for the Government to break down the records of these expenditures so as to obtain a useful costs analysis—how much has been spent for any particular purpose at any particular time.

Much time and effort has been spent in the past in auditing the details of these reimbursements and attempting to analyze them in terms of intelligible costs.

Contractors' Relation to Government

In studying this matter, the Commission's accounting staff realized that for accounting purposes the major cost type contracts should be considered as though they were to use a business concept—affiliated corporations as far as their contracts with the Commission were concerned. Costs would thus be considered as incurred by the Government at the moment the contractors incurred them, and the movement of cash between the Government and its contractors should have no more cost-accounting significance than the transfer of funds from one bank account to another.

Auditing and Financing

If Commission contractors established separate sets of accounts for their operations under the contracts, kept Commission funds separate from their own, and maintained adequate systems of internal control and pre-audit on the expenditure of these funds, under Commission direction, it would become unnecessary for the Commission to subject such contractors' expenditures to the detailed item-by-item examination of the conventional Government type. For this examination, the Commission could substitute a comprehensive field audit—such as would be performed by a public accounting firm in the examination of the accounts of any business.

By eliminating the cumbersome reimbursement procedure under which all the detailed transactions are individually audited before reimbursement, the Commission could furnish funds to the contractor as promptly as required. Contractors could then operate with a smaller working fund advance.

Comprehensive Accounting

By treating cost-type contractors as operating affiliates for accounting purposes and subjecting their contracts, accounts, and statements to periodic commercial-type audits, it becomes possible, under the new system, to adopt the accounting techniques of intercompany accounts and consolidated statements. The Commission establishes "intercompany" accounts on its books for cost-type contractors to charge them with all funds, facilities, and material provided them. The contractors keep similar accounts to credit the Commission with these items. Customary asset, liability, and operating accounts are maintained by contractors. From these accounts they prepare monthly financial and cost statements, which the Commission uses in preparing consolidated statements for the entire program. This makes unnecessary all attempts to obtain costs by analyzing contractor's reimbursements.

INSTALLATION OF NEW ACCOUNTING METHODS

Simple and almost obvious as these concepts may appear, the practical application of them to a going concern of the magnitude of the Commission's extensive and diversified operations has added up to a considerable task. The Commission has enjoyed the wholehearted support and assistance of the Comptroller General of the United States and his staff in instituting the new accounting policies. Adopting the commercial-type audit at the contractor's site in lieu of the voucher-type of reimbursements has posed some technical difficulties which have temporarily delayed realization of the full benefit to be derived from the new approach. Here again, Comptroller General Warren has shown great interest and helpfulness in working out these problems.

Contractors, for the most part, have received these new procedures with approval. The procedures made sense to industrial contractors, as well as to the public accountants consulted, because they are pat * * *

EXHIBIT 14

ERDA-PR TEMPORARY REGULATION NO. 17, 4/2/76, EXHIBIT 14 TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT (R.III)

UNITED STATES
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
Washington, D.C. 20545

April 2, 1976

ERDA-PR TEMPORARY REGULATION NO. 17

SUBJECT: ESTABLISHING AND NEGOTIATING PROFITS AND FEES

1. *Purpose:* This regulation establishes ERDA profit/fee policy.

2. *Effective date:* This regulation is effective upon publication in the *Federal Register.*

3. *Expiration date:* This regulation will remain in effect until it is canceled or until its provisions are incorporated into the ERDA-PR.

4. *Explanation of changes:*

Delete subsections 9-3.808-50 and 9-3.808-51 and add the following section 9-3.808 and new subsection 9-3.808-50, 9-3.808-51 and 9-3.808-52:

§ 9-3.808 *Profit or fee.*

§ 9-3.808-1 *General.*

(a) A fair and reasonable provision for profit or fee is called a profit objective. The profit objective, when combined with the estimated cost of contract performance, becomes the contract price objective the ERDA negotiator takes into negotiations with a contractor. The profit

objective is an amount which, in the judgment of the ERDA negotiator, is appropriate for the procurement. The price objective should be reasonable in relation to the task to be performed and the requirements placed on the contractor.

(b) ERDA's policy is to: reward contractors who undertake more difficult work requiring higher skills; allow contractors the opportunity to earn profits commensurate with the cost risk they are willing to assume—the greater the risk, the higher the profit objective; reward contractors who have excellent records of performance; and reward contractors who provide their own facilities and financing or who have established their competence through prior research or development work undertaken at their own risk.

(c) The profit objective will be determined individually for each contract. Across-the-board agreements as to rates of profit or fee will not be made. The determination of a fair and reasonable profit or fee is a matter of sound business judgment.

§ 9-3.808-2 *Factors for determining profit or fee.*

(a) The factors in FPR § 1-3.808-2 will be used in establishing profit objectives. However, if the work is to be performed in commercial facilities, the weighted guidelines technique in § 9-3.808-50 will be used in place of those factors when the contract is estimated to exceed $500,000, and may be used on contracts below that figure.

(b) The amounts payable as fees on contracts for operation of Government-owned facilities, for construction and for performance of on-site support and architect-engineering services will not exceed maximum amounts derived from the appropriate fee curve set forth in the interim ERDA Profit and Fee Handbook (March 1976). Requests to pay fees in excess of the maximum will be sent to the Director of Procurement, ERDA Headquarters.

§ 9-3.808-50 *Weighted guidelines.*

(a) Weighted guidelines is an analytical technique that requires consideration of the relative value of appropriate profit factors in establishing a profit objective and conducting negotiations. It also provides a basis for justifying the objective and explaining any significant departure from the objective in negotiating a final agreement.

(b) Analysis of weighted guideline factors is done using information available in proposals, audit reports, performance appraisals, preaward surveys and the like. No more data on or analysis of costs is required to establish a profit objective than is required to determine reasonable estimated costs.

(c) If use of weighted guidelines results in a profit objective in excess of limitations established by statute or regulation, the percentage allowed pursuant to such limitations shall be the profit objective. No local administrative ceilings may be placed on profit or fee.

(d) The factors set forth below shall be used in applying weighted guidelines. The weight ranges listed after each factor shall be used in all instances.

Profit Factors	Weight Ranges
Contractor's Input to Total Performance	
Direct Materials	
Purchased parts	1 to 4%
Subcontracted items	1 to 5%
Other materials	1 to 4%
Engineering labor	9 to 15%
Engineering overhead	6 to 9%
Manufacturing labor	5 to 9%
Manufacturing overhead	4 to 7%
General and administrative expenses	6 to 8%
Contractor's Assumption of Contract Cost Risk	0 to 7%
Type of contract	
Reasonableness of cost estimate	
Difficulty of contract task	

Profit Factors	Weight Ranges
Record of Contractor's Performance	−2 to +2%
Small business participation	
Management	
Cost efficiency	
Reliability of cost estimates	
Timely deliveries	
Quality of product	
Inventive and developmental contributions	
Labor surplus area participation	
Selected Factors	−2 to +2%
Source of resources	
Governmental or contractor source of financial resources	
Special achievement	
Other	
Special Profit Consideration	0 to +4%

(e) Use of the weighted guidelines method of profit analysis is discussed in detail in the interim ERDA Profit and Fee Handbook (March 1976).

§ 9-3.808-51 *Contracts with not-for-profit organizations (other than educational institutions).*

(a) It is general ERDA policy to pay fees in contracts with not-for-profit organizations; however, it is a matter of negotiation whether a fee will be paid in a given case. In making this decision, consider whether the contractor is ordinarily paid fees for the type of work involved. No fees will be paid when the contract involves a cost sharing arrangement.

(b) Where the contract with the not-for-profit organization is for the operation of Government-owned facilities, calculate fees using the procedures and schedules applicable to operating contracts set forth in the interim ERDA Profit and Fee Handbook (March 1976). Where the contract work is to be performed in the contractor's

privately-owned facilities, calculate fees using weighted guidelines.

(c) In computing the amount of fee to be paid, take into account the tax posture of the not-for-profit organization. While it is difficult to establish the degree to which a fee under any given contract contributes to an organization's overall net profit, assume that there is an element of profit in the fee paid.

(d) In order to assure consideration of the tax posture of not-for-profit organizations during fee negotiation, calculate the fee as for a contract with a commercial concern and then reduce it at least 25%. However, depending on the circumstances, contracting officers may pay fees somewhere between this amount and the fee allowable if it were a commercial concern. When this is the case, document the contract files to specifically state the reason or reasons.

§ 9-3.808-52 *Contracts with Educational Institutions.*

(a) It is ERDA policy not to pay fees under contracts with educational institutions.

(b) However, some university contractors operate Government-owned laboratories essentially apart from and not in conjunction with their other activities and the complexity and magnitude of the work are not normally found in university contracts. If, in these cases, the parties are not able to agree as to the amount of central university indirect expenses for purposes of reimbursement under the contract, it is permissable to pay a "management allowance", which, where necessary, may exceed ERDA's conservative estimate of anticipated central indirect expenses. However, the amount may not exceed the university's estimate of properly allocable central indirect expenses or the fee developed using the weighted guidelines, whichever is lower.

(c) As noted above, the payment of a management allowance can be justified only under special circumstances; accordingly, such arrangements shall not be

negotiated without the prior approval of the Director of Procurement.

5. *Authority*: Section 105 of the Energy Reorganization Act of 1974 (P.L. 93-438).

/s/ Robert F. Allnutt
ROBERT F. ALLNUTT
Acting Director of Procurement

EXHIBIT 13-B TO PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANTS' INTERROGATORIES (Second Set) 2/7/77 (R.V.)

PAYMENTS TO STATE OR LOCAL TAXING UNITS

* * * * *

EXCERPT OF A LETTER FROM R. C. LANPHIER, JR., DEPUTY ASSISTANT SECRETARY OF DEFENSE (SUPPLY AND LOGISTICS), TO HON. ROWLAND HUGHES, DIRECTOR, BUREAU OF THE BUDGET (REPRINTED IN SENATE HEARINGS BEFORE THE COMMITTEE ON GOVERNMENT OPERATIONS ON BILLS RELATING TO PAYMENTS OF TAXES, OR IN LIEU OF TAXES, TO STATE OR LOCAL TAXING UNITS (PART 2), 84th Cong., 2d Sess. at 248-249 (1956))

* * * * *

and to pledge the credit of the Government therefor, were limited to some cost-plus-a-fixed-fee construction contracts of the Navy. Report was also made of the fact that neither the Army nor the Air Force used the device and that the Navy made no use of it in any other type of contract, including firm fixed-price construction contracts.

We also indicated that whether use of the purchase-agent device would be extended or continued was being studied by a committee composed of representatives of the military departments as well as the Office of Secretary of Defense. In accordance with our commitment to provide you with the results of that study, we wish to advise that this study has now been completed. It has been determined that it will be the policy of the Department of Defense not to designate prime contractors on cross-type [sic] contracts to be performed within the continental limits of the United States, as agents of the Government for the purchase of supplies.

Sincerely yours,

R. C. LAMPHIER, JR., [sic]
Deputy Assistant Secretary of Defense
(Supply and Logistics).

ATOMIC ENERGY COMMISSION,
Washington, D.C., March 5, 1956

HON. JOHN L. MCCLELLAN,
Chairman, Committee on Government Operations,
United States Senate.

DEAR SENATOR MCCLELLAN: You have requested the comments of this Commission on S. 2100. That bill would prohibit any agency of the United States from entering into any contract by which a private person is constituted an agent of the United States for the purpose of purchasing or acquiring property necessary to carry out his contract, and with authority to purchase or acquire such property in the name of the United States or agency thereof. It would further render null and void, insofar as the application of State and local use taxes are concerned, any contract provisions constituting such a person an agent to purchase or acquire property.

The bill would appear to have two objectives: (1) To permit imposition of State and local sales and use taxes on purchases made by the United States through agents and (2) to prohibit the use by the United States for any purpose of contracts constituting the contractor a purchasing agent.

To the extent that the bill deals with a problem of State and local taxation, we believe it is a departure from sound principle. In *Alabama* v. *King and Boozer* (314 U.S. 1), the Supreme Court adopted the principle that a State may not constitutionally levy a sales or use tax on purchases made by the United States Government, whether or not such purchases are made through a contractor. It declared the question in such cases to be whether the United States was the purchaser; if it was, the transaction was tax-exempt, while if the contractor was the purchaser, the transaction was taxable. Finding in that case that the contractors made the purchases with their own funds and on their own credit, and did not have "the status of agents of the Government to enter into contracts or to pledge its credit" (314 U.S. at 13), it held the United States was not the purchaser and

the transaction could be taxed. In *Kern-Limerick, Inc.* v. *Scurlock* (347 U.S. 110), the Court, on a different set of facts, concluded that the United States was the purchaser, since the contractor executed the purchase documents on behalf of and as agent for the United States. In short, the Court held that the United States, like any private person, could act through an agent and that when it did so it was, as principal and under accepted doctrines of agency, the real party to the purchase transaction. The result is consistent with numerous decisions which have held in appropriate circumstances that a tax may be deemed imposed on the United States even though formally assessed against a private party (e.g., *United States* v. *Alleghany County*, 322 U.S. 174. 186-189, and cases cited; cf. *Mayo* v. *United States*, 319 U.S. 441).

Accordingly, we do not perceive a sound basis for distinguishing, for tax purposes, between purchases made by the United States directly and through contractors acting as agents.

S. 2100 as drafted, however, would do more than consent to the taxation of certain governmental purchases which are now tax exempt. Section 2 would declare purchase agency provisions "void" for certain purposes and section 1 would prohibit the entering into such provisions for any purpose. The effect would be to deny to the United States and its agencies, notwithstanding the provisions of any other act, the authority to enter into contracts constituting a private person a purchasing agent. Such a prohibition would significantly affect the operations of this Commission.

The authority of the Commission to constitute contractors its agents is supported by *Kern-Limerick Co.* v. *Scurlock*, *supra*, and by *DuPont* v. *Washington* (267 P. 2d 677).

The Commission's practice has been to conduct its operations to the maximum degree possible through contractors, thereby availing itself of industrial experience and ability, keeping to a minimum the size of the Commission's staff, and promoting ultimate industrial participation in the atomic energy industry. In general, it

has not entered into contracts expressly designating the contractor an agent. In some situations, however, it has found that particular functions can most effectively be carried out by contracts of express agency. These include the following:

(1) In the area of community management several contractors have been expressly designated agents to lease and manage Government-owned real property, and to operate Government-owned transportation systems, public utility systems, and hospitals on behalf of the Commission. In each of these cases, since the contractor is an agent for all other purposes, it would appear inappropriate to give it a different status for purposes of procurement of property needed for the contract work.

(2) Pursuant to the Federal Property and Administrative Services Act, many basic commodities needed by the Commission and its contractors for the carrying out of programs authorized by the Atomic Energy Act are procured through General Supply Schedule Contracts entered into by the General Services Administration for the benefit and use of other agencies of the United States. For purposes of administration, it has been found most efficient to authorize the Commission's cost-type management contractors to place orders against such contracts as agents for the Commission, rather than have the Commission place such orders. This arrangement has been acceptable to the General Services Administration and has worked effectively to expedite the contractors' operations on behalf of the Commission and to minimize the number of Commission personnel required. In these cases, although the contractor may not be expressly designated an agent for other purposes, it is necessarily an agent for the purpose of exercising rights under contracts entered into in the name of the United States, and is so designated.

(3) In a number of other situations the Commission has found it convenient to appoint cost-type management contractors its agents for the purpose of administering many substantial procurement contracts which were

placed directly by the Commission. In such cases the contractor so designated may perform many of the purchasing functions, such as receiving, inspecting, accepting or rejecting, and paying for the purchased materials on behalf of the Commission. While we do not believe such a relationship would come within S. 2100, the broad language of the bill as presently drafted might create doubts.

In addition to these situations, the bill might also create doubts with respect to a very large volume of purchases conducted by Commission cost-type contractors. Most of the Commission's major cost-type contracts may properly be described as management contracts under which the contractor is retained to construct or operate for the Commission facilities which the Commission owns. Typically, in such cases the contractor uses no funds of its own but is authorized to make payments out of Government funds which are advanced to it and held in a special Government contract account for the purpose. Typically, also, the contract provides that title to all goods purchased passes directly from the vendor to the United States—a provision which, among other things, renders theft or mutilation of such materials a Federal offense, facilitates transfer of them between Commission contractors as needed, and eliminates possible problems as regards claims or liens against such property stemming from other activities of the contractor not related to AEC work. In such cases, while the contractor is not expressly designated an agent, it is given authority to purchase or acquire property in the name of the United States, and to expend funds of the United States for that purpose. Consequently, there might be some question, should S. 2100 be enacted, whether this form of contracting would continue to be permissible.

Each of the forms of contracting described above has been adopted by the Commission because it was found to have significant practical advantages wholly apart from any tax consequences that might ensue. In particular, the Commission's method of contracting has facilitated the administration of a vast procurement effort, generally conducted under very tight time schedules, with a mini-

mum of Government personnel, while yet retaining basic financial and accounting checks necessary to safeguard the public interest. Adoption of S. 2100 might impose limitations on the Commission's contracting power, not based on any study of the particular situations which led to the adoption of particular contracting procedures, which would operate to the disadvantage of the Commission's program.

For the foregoing reasons we would not recommend enactment of S. 2100.

The Bureau of the Budget has advised that it has not objection to the transmittal of this report.

Sincerely yours,

K. E. FIELDS, *General Manager.*

ATOMIC ENERGY COMMISSION,
Washington, D.C., April 18, 1956.

HON. JOHN L. MCCLELLAN,
Chairman, Committee on Government Operations,
United States Senate.

DEAR SENATOR MCCLELLAN: This is in response to your requests for comment on bills S. 826, S. 1566, S. 1657, S. 2390, and S. 2754 of the 84th Congress, which would variously authorize taxation of certain Federal property by State and local tax authorities, and provide for payment by Federal agencies of sums in lieu of taxes with respect to certain other Federal property.

We have been informed by Senator Humphrey, of your committee, of the preliminary hearing on these bills which was held July 25, 1955, and of a contemplated further hearing in April, at which he will preside. The Commission believes that this letter will adequately express its views on the proposed legislation and has no desire to be heard orally.

THE BILLS

As a preliminary matter, comment by the Commission on S. 826 would not appear to be necessary because of its specific exemption for AEC property. S. 826 would per-

mit State and local taxation of, or payments in lieu of taxes on, defense production facilities. By definition, in section 3(c) of S. 826, a defense production facility would not include property owned or used by the AEC for purposes of the Atomic Energy Act of 1946, as amended. The reference to the 1946 act, as amended, would embrace the current Atomic Energy Act of 1954.

S. 1566, S. 1657, and S. 2390 open with the premise and declaration that the Federal Government is under no constitutional obligation to pay taxes or make contributions in lieu of taxes on account of Federal property. S. 1566 would declare it the policy of the United States to avoid, insofar as feasible, impairment of State and local finances through Federal acquisition of real or certain tangible personal property or Federal requirements for State and local services arising directly from Federal ownership or use of property. S. 1657 and S. 2390 would, in somewhat similar vein, declare it to be the policy of the United States to make fair and equitable tax payments and contributions in lieu of taxes to compensate the taxing authorities for tax revenue of which they are deprived by Federal ownership or control of property. All three bills state the purpose to avoid inequities between State and local taxpayers and Federal taxpayers in the distribution of tax burdens and governmental costs associated with Federal ownership or use of property. It is further stated that the State and local governments would be expected when requested, to make available to the Federal property, and residents thereon, the public services accorded other properties and residents upon the same terms.

In furtherance of these declarations and policies, the 3 bills set forth 2 broad groupings of provisions providing:

First, consent to State and local ad valorem taxes on certain classes of properties, principally property to which the Federal Government holds title to protect its financial interest in connection with loans or contracts of insurance or guaranty, or property to which it holds title but leases its interest or sells it conditionally to taxable persons; and

* * * * *

JOHN F. McNETT AFFIDAVIT 10/5/77, FILED IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT w/EXHIBITS A-E (R.III)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 74-418M

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF NEW MEXICO; BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; and FRED L. O'CHESKEY, as Commissioner of Revenue of and for the State of New Mexico, and his successors in office, DEFENDANTS

AFFIDAVIT

I, JOHN F. McNETT, being first duy sworn, state:

1. I am Assistant Chief Counsel, United States Department of Energy (DOE), formerly the Energy Research and Development Administration (ERDA), Albuquerque Operations Office, Albuquerque, New Mexico, and as such I am the staff attorney in DOE responsible for coordinating the above-entitled civil action with our DOE Washington Headquarters Office and with the Tax Division of the United States Department of Justice, the agency with the responsibility for handling the above-entitled litigation. In an affidavit submitted in the above-entitled action in support of plaintiff's motion for summary judgment filed March 29, 1976, I stated the background and events following the cited decision of the New Mexico Court of Appeals.

2. The case referred to in paragraph 1. was decided on a stipulation which was submitted as Exhibit 1 to my earlier affidavit. Attached as exhibits to that stipulation in the record before the New Mexico Court of Appeals were eight documents, listed in paragraph 13. of the stipulation, by various officials and employees of the State of New Mexico between 1947 and 1961. These documents

were the ones to which the New Mexico Court of Appeals referred in its opinion at 531 P.2d at 213-214.

3. Attached hereto as Exhibits 2-A through 2-E to this affidavit are five of the eight documents referred to in paragraph 2. as follows:

A. Letter, Commissioner Lujan to AEC, December 29, 1950.

B. Letter, Assistant Attorney General McCulloch to Bureau of Revenue, School Tax Division, January 7, 1954.

C. Letter, Bureau of Revenue (Barker) to AEC, July 2, 1957.

D. Letter, Bureau of Revenue (Robinson) to AEC, August 28, 1959.

E. Letter, Bureau of Revenue (Lujan) to AEC, November 8, 1949.

4. On May 3, 1977, I attended the deposition of Daniel H. McGrath, Jr.; Acting Director, Special Financing Staff, Bureau of Government Financial Operations, U.S. Department of Treasury. Prior to his deposition, Mr. McGrath furnished to counsel for defendants and counsel for plaintiff statistical data concerning the use of the letter-of-credit method of financing. Attached hereto as Exhibit F is a document entitled "Numbers and Amounts of Letters-of-Credit-FRB System for Period Ending March 8, 1977," which was prepared by the Special Financing staff on the basis of U.S. Treasury Department records and furnished to counsel, along with other statistical data, prior to the McGrath deposition.

/s/ John F. McNett
JOHN F. MCNETT

SUBSCRIBED AND SWORN TO before me this 5th day of October, 1977.

/s/ Elizabeth R. Gallegos
Notary Public

My Commission Expires February 27, 1981.

EXHIBIT 2-A

Re: C-2

Mr. Chalmers C. King
Acting Assistant General Counsel
United States Atomic Energy Commission
Santa Fe Operations Office
Los Alamos, New Mexico

Dear Mr. King:

I have made a careful study of your letter of December 28 concerning the change in status of the Zia Company with reference to their relationship with the Atomic Energy Commission. Without going into detail, it is my opinion bases upon the statements made in your letter and upon the exhibits attached thereto that the Zia Company is, so long as it is acting under those conditions, acting purely as an agent of the Atomic Energy Commission and that the purchases made are as such agent and not for themselves; that since the title to all property of whatever kind immediately vests in the Atomic Energy Commission when it passes from the supplier, therefor the payments are in fact being made by the suppliers directly to an agency of the United States government and are, therefor, within the cloak of the exemption provided for in Section 76-1405 of the New Mexico Statutes Annotated so that the suppliers need not include their receipts from such sales in their gross receipts when computing the School Tax due to the State of New Mexico.

Since the same condition exists with reference to purchases made outside of the State of New Mexico, it is, also, my opinion limited by the statements made and the exhibits furnished in your letter of December 28 that the New Mexico Compensating Tax would not attach as against the Zia Company.

Very truly yours,

LOUIS C. LUJAN
Commissioner of Revenue

December 29, 1950

EXHIBIT 2-B

STATE OF NEW MEXICO
Office of Attorney General

Santa Fe, New Mexico
January 7, 1954

J. C. Bergere, Director
School Tax Division
Bureau of Revenue
Santa Fe, New Mexico

Dear Mr. Bergere:

In your letter dated December 28, 1953, you submitted additional information concerning the activities of the Zia Company at Los Alamos for our information in connection with an opinion written to you relative to taxing the Zia Company on its operation of the Lodge at Los Alamos.

After studying this additional information and seeing the contract which the Zia Company has with the Atomic Energy Commission, it is apparent that the Zia Company acts more in the nature of an agent than of an independent contractor and that the items purchased by it are actually purchased with government funds and title vests in the government immediately.

For these reasons, you may consider Opinion No. 5845 to the effect that the Zia Company is liable for gross receipts tax on its operations in Los Alamos, particularly at the Lodge, as being overruled and withdrawn.

Very truly yours,

/s/ C. C. McCulloh
Assistant Attorney General

EXHIBIT 2-C

July 2, 1957

Mr. Sterling F. Black, Counsel
Atomic Energy Commission
Los Alamos, New Mexico

YOUR REFERENCE: LC:JC

Dear Mr. Black:

I am in receipt of your letter of June 28th with which you transmitted excerpts from the contracts between the Atomic Energy Commission and the Zia Company and the ACF Industries, Inc.

With respect to the Zia Company contract, I note under Article XIII, Paragraph C, that except as otherwise directed by the Commission, title to all property of every kind and description acquired by the Contractor, the cost of which is allowable under this contract, (covered by other provisions of the contract), shall pass directly from the vendor to the Government, and in view of this provision, I am of the opinion that no property purchased and paid for with Government funds, as provided in the contract, would be subject either to the sales tax or compensating tax.

As I have advised you before, I don't consider the privilege tax upon the Zia Company as contractor as enforceable, since the contract is made directly with a government agency.

With regard to the ACF Industries, Inc. contract, I find substantially the same provisions contained in Article XI, Paragraph 3 with respect to title to property acquired and used in the performance of the contract as found in the Zia Company contract, and my opinion as to the taxability upon the purchase and use of the property and upon the contractor for the privilege of doing business is the same as hereinbefore mentioned as to the Zia Company contract.

As heretofore stated to you and your associates, I am definitely of the opinion that there is no tax liability arising in any respect upon the contract with the University of California or the contract with the Sandia Corporation, both of which are non-profit organizations.

Your very truly,

CHARLES B. BARKER
Attorney
Bureau of Revenue

CBB/gt

cc: School & Compensating Tax Division

EXHIBIT 2-D

STATE OF NEW MEXICO
BUREAU OF REVENUE
Legal Division
Santa Fe

[SEAL]

August 28, 1959

Mr. Chalmers C. King
U. S. Atomic Energy Comm.
P. O. Box 5400
Albuquerque, New Mexico

Dear Mr. King:

I am in receipt of your letter regarding the purchases of gasoline by ACF Industries Inc., from the Texaco Co., wherein you state that the Texaco Co., informed ACF the following: "It is our understanding that New Mexico's Senate Bill No. 120 applies only to direct agencies of the Federal Government and it is also our understanding that Mr. Johnny Walker, Director of the New Mexico Bureau of Revenue has ruled that ACF is not exempt from this tax."

You further state in your letter that it is your position, "that the purchase of tangible personal property by a cost-type, advanced funds contractor of the United States Atomic Energy Commission, such as ACF, is tantamount to a purchase of the property by the Commission itself has been consistently recognized in the administration of the Emergency School Tax Act."

This is to inform you that the Bureau of Revenue of the State of New Mexico has taken a position that sales to the cost-type advanced fund contractors who are by federal law agents of the Federal Government are exempt from the Emergency School Tax Act under the provi-

sions of Senate Bill No. 120. At the present time we recognize three of such industries within the State of New Mexico, ACF Industries Inc., Zia Co. and the Sandia Corp. I am enclosing a copy of a letter this office prepared to Mr. John C. Burke, operating manager of the General Electric Supply Co., which may be of some assistance to you.

We hope this sufficiently answers your question but if we may be of further service please let me know.

Sincerely yours,

/s/ Richard H. Robinson
RICHARD H. ROBINSON
Chief Counsel
Bureau of Revenue

RHR/ls

EXHIBIT 2-E

COPY

NEW MEXICO
BUREAU OF REVENUE
SANTA FE, NEW MEXICO

November 8, 1949

United States Atomic Energy Commission
Santa Fe Operations Office
Los Alamos, New Mexico

Attention Mr. Chester G. Brinck

Dear Mr. Brinck:

I have made a careful study of your letter of November 1st, together with enclosure attached thereto, and in reply to that letter I should like to split my opinion; one part of the opinion being directed to the position of the Sandia Corporation under the New Mexico Emergency School Tax Act and the other part of the opinion being directed to their position under the New Mexico Compensating Tax Act.

After a careful consideration of the material which you sent me, which includes a copy of the contract between the Atomic Energy Commission and Western Electric Company, Inc.; a copy of Sandia Corporation's letters of October 28, 1949 to the First National Bank in Albuquerque and to the Albuquerque National Bank at Albuquerque, and a copy of letter of October 31st from the Atomic Energy Commission to George A. Landry, President of the Sandia Corporation, at Albuquerque, New Mexico, I have come to the conclusion that title to all property of whatever kind acquired by the Sandia Corporation will pass directly from vendors to the Atomic Energy Commission, that the Sandia Corporation will pay for such property with money belonging to the Atomic Energy Commission, even though on deposit to the memo of Sandia Corporation.

It is therefore my opinion that the gross receipts from sales made in New Mexico are not to be included by vendors in their gross receipts for tax purposes, since such receipts are exempted under the provisions of Section 76-1405 New Mexico Statutes, 1941, Annotated.

Since title to all property purchased outside of the State of New Mexico rests immediately in the Atomic Energy Commission, without passing through Sandia Corporation, it is my opinion that the storage, use or other disposal of such properties is exempted under the provisions of Section 76-1504, New Mexico Statutes, 1941 Annotated.

Very truly yours,

/s/ Louis C. Lujan
LOUIS C. LUJAN
Attorney
Bureau of Revenue

LCL:cp

EXHIBIT 1 TO AFFIDAVIT OF JOHN F. McNETT FILED IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' OTHER PROCEDURAL DEFENSES

BEFORE THE COMMISSIONER OF REVENUE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF THE ZIA COMPANY AND THE UNITED STATES OF AMERICA AGAINST ASSESSMENT NO. 109339

IN THE MATTER OF THE PROTEST OF LOS ALAMOS CONSTRUCTORS, INC., AND THE UNITED STATES OF AMERICA AGAINST ASSESSMENT NO. 109341

STIPULATION

The United States of America, hereinafter called "U.S.," The Zia Company, hereinafter called "Zia," Los Alamos Constructors, Inc., hereinafter called "LACI," and the Bureau of Revenue of the State of New Mexico, acting with the Attorney General of the State of New Mexico, hereinafter called "Bureau," hereby stipulate and agree that the facts contained in this stipulation are to be deemed received in evidence in all further proceedings, including actions in any court, and are to be treated as having been conclusively established by competent evidence.

* * * * *

4. For purposes of this stipulation, all tangible personal property needed for the performance of Contract ENG-90, has been purchased from non-government sellers, some of whom were transacting or engaging in business in New Mexico, others of whom were not transacting or engaging in business in New Mexico. All such property has been purchased by the issuance of purchase orders by and in the name of Zia. All such purchases have been conducted in accordance with Article X, "Subcontracts, Purchase Orders and Procurement," of Con-

tract ENG-90 and in accordance with the provisions of Article XIV, "Property," of Contract ENG-90. The contracting officer of Contract ENG-90, in accordance with the second sentence of paragraph 2 of Article XIV, did not at any time provide otherwise than for passage of title to property directly from the vendor to the U.S. to the extent specified in the contract. Attached hereto as "Exhibit 3," comprising 2 pages, "Exhibit 4," comprising 2 pages, and "Exhibit 5," comprising 5 pages, are copies of purchase order forms used in procurement of tangible personal property by Zia during the period January 1, 1966, through June 30, 1967. "Exhibit 3" was used for all procurements between January 1, 1966, and approximately May of 1967. From May 1967 through June 1967, "Exhibit 4" was used for procurements under $2500 and "Exhibit 5" was used for procurements over $2500.

5. LACI, a corporation organized and existing under the laws of the State of New Mexico, has, since March 31, 1953, been performing work for AEC under a written contract, designated Contract AT(12-1)-1357, hereinafter called "Contract 1357." Through June 30, 1967, 38 written modifications to Contract 1357 had been executed by the parties. At all times, Contract 1357 provided, in general, that LACI would perform construction, alteration, and repair work, and other related work, for AEC in support of AEC research and development * * *

AFFIDAVIT OF JOHN F. McNETT, FILED IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' OTHER PROCEDURAL DEFENSES W/EIGHT EXHIBITS (R.I. 43-81)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 75-418

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF NEW MEXICO; BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; and FRED L. O'CHESKEY, as Commissioner of Revenue of and for the State of New Mexico, and his successors in office, DEFENDANTS

AFFIDAVIT

JOHN F. McNETT, being first duly sworn, deposes and says:

1. I have since July 3, 1961, been employed as an attorney in the Office of Chief Counsel of the Albuquerque Operations Office (ALO) of ERDA, formerly AEC. Throughout my employment with AEC and ERDA I have had responsibility for handling state and local tax problems which arise in the conduct of ALO activity, including problems arising under the New Mexico Emergency School Tax Act, the New Mexico Compensating Tax Act, and the New Mexico Gross Receipts and Compensating Tax Act. I was the attorney primarily responsible for the handling of AEC's participation in discussions and litigation with the Bureau of Revenue, State of New Mexico, which ultimately resulted in the decision of the New Mexico Court of Appeals in *United States of America, Zia, and LACI* v. *Bureau of Revenue, State of New Mexico*, 87 N.M. 164, 531 P.2d 212 (1975).

2. In the summer of 1967 the Bureau of Revenue, State of New Mexico, with AEC consent audited the financial books and records of AEC pertaining to operations under AEC contracts with the Zia Company (Zia) and Los Alamos Constructors, Inc. (LACI) during the period July 1, 1964, through June 30, 1967. At the conclusion of this audit, on August 25, 1967, the Bureau of Revenue issued assessments under the Emergency School Tax Act and the Compensating Tax Act against Zia and LACI: (1) for school taxes (i.e., gross receipts taxes) upon and measured by AEC funds advanced for contract operations during the audit period and (2) for compensating taxes on the use of tangible personal property procured from private vendors in performance of the Zia and LACI contracts during the audit period. Zia, LACI, and the United States Government (acting through the Department of Justice at the request of AEC) filed protests against these assessments with the Commissioner of Revenue, State of New Mexico under the New Mexico Tax Administration Act. At no time throughout the proceedings and litigation which ensued did the Commissioner of Revenue or any of his attorneys question the right of the United States to be a party to any of the proceedings.

3. Upon issuance of assessments and filing of protests referred to in paragraph 2, there followed a series of meetings and discussions, extending over a period of several years, between and among officials of Zia, LACI, and AEC, the Commissioner of Revenue, their attorneys, and attorneys of the U.S. Department of Justice concerning the assessments, the issues raised by them, and possible methods of resolution. In 1969 these discussions finally resulted in an agreement among all concerned, including then Commissioner of Revenue Franklin Jones, that issues then unresolved would be submitted to the New Mexico Court of Appeals for resolution on a stipulated statement of facts with exhibits. Attached hereto as Exhibit 1 is the stipulation, without exhibits, on which the issues

raised by the 1967 assessment against Zia and LACI were submitted to the New Mexico Court of Appeals.

4. One issue raised in the test litigation referred to above was whether purchases of tangible personal property for AEC accomplished by the issuance of purchase orders by Zia and Sandia Corporation qualified for a deduction under the New Mexico Gross Receipts and Compensating Tax Act for sales to the United States. To protect the interests of vendors, the Bureau of Revenue and AEC on this issue during the period of the litigation, the Bureau and AEC entered into an agreement, designated Contract AT(29-2)-2849 (Contract 2349). Under Contract 2849 Zia and Sandia Corporation were permitted to issue special nontaxable transaction certificates to their vendors of tangible personal property while the issue of the tax treatment of these transactions was being litigated. AEC agreed that payment would be made to the Bureau for these taxes if test litigation held that such taxes were owing. A copy of Contract 2849 is attached hereto as Exhibit 2. The Commissioner of Revenue authorized the special nontaxable transaction certificates provided for in Contract 2849 in Ruling 69-001-18 of the Commissioner of Revenue, dated December 18, 1969. A copy of Ruling 69-001-18 is attached hereto as Exhibit 3.

5. On January 8, 1975, the New Mexico Court of Appeals handed down its decision reversing the Commissioner of Revenue on the Zia and LACI protests against the assessments referred to in paragraph 2. The decision is reported in 87 N.M. 164, 531 P.2d 212 (1975).

6. The Commissioner of Revenue did not seek further review of the decision of the New Mexico Court of Appeals referred to in paragraph 5. I prepared for the signature of the Manager, ALO, a letter to the Commissioner of Revenue dated January 30, 1975, requesting that permanent nontaxable transaction certificates be issued to replace the temporary ones authorized by Ruling 69-001-18, that the Commissioner agree that the rec-

ord keeping required by ERDA by Contract 2849 is no longer necessary, and that the principles enunciated in the concurring opinion of Judge B. C. Hernandez be recognized by the Commissioner of Revenue. A copy of the January 30, 1975, letter from the Manager, ALO, to the Commissioner of Revenue is attached hereto as Exhibit 4. The Commissioner of Revenue responded to Exhibit 4 in a letter dated February 28, 1975, by denying all of the requests made in Exhibit 4. The Commissioner's letter of February 28, 1975, is attached as Exhibit 5.

7. As of June 30, 1975, Zia and Sandia Corporation had reported total estimated contingent liabilities of ERDA under Contract AT(29-2)-2849 in an estimated amount of $8,939,000. In addition, erroneous application of the 4% New Mexico gross receipts tax to ERDA advanced funds would subject ERDA to liabilities estimated at $10,000,000 per year.

8. At some point after the litigation referred to in preceding paragraphs was submitted to the New Mexico Court of Appeals, attorneys for the New Mexico Bureau of Revenue began taking the position, contrary to that taken in the test litigation, that the United States could not be a party to Tax Administration Act proceedings before the Commissioner of Revenue in which contractors of the United States were being assessed taxes. The Bureau took this position even when it was apparent that the United States would ultimately be required to pay the taxes assessed and when the United States claimed that the purported taxes were erroneous and in violation of its sovereign rights. I first became aware of this reversal of the Bureau's position in connection with a protest filed by Ross Aviation, Inc., an AEC, ALO contractor. At the request of AEC, attorneys for the Department of Justice moved to intervene in the proceedings before the Commissioner of Revenue on protests previously filed by Ross Aviation. The Commissioner of Revenue's delegate conducted a hearing on the Government's motion to inter-

vene on April 3, 1974, and denied the Government's motion in a ruling dated April 11, 1974. A copy of the Bureau of Revenue ruling of April 11, 1974, is attached hereto as Exhibit 6.

9. ERDA responded to the Commissioner's letter of February 28, 1975, Exhibit 4, with a letter of March 12, 1975, a copy of which is attached hereto as Exhibit 7. In Exhibit 7 a meeting between ERDA and Bureau representatives was proposed, and ERDA requested that Contract 2849 be amended to include another ERDA advanced fund contractor, Wallace/Brown-Olds/Howard, among those contractors authorized to issue special nontaxable transaction certificates pending final resolution of the issues of tax liability.

10. The Commissioner responded to ERDA's letter of March 12, 1975. Exhibit 7, with a letter of May 16, 1975, a copy of which is attached hereto as Exhibit 8. In Exhibit 8 the Commissioner agreed to meet with ERDA representatives, denied the ERDA request to authorize Wallace/Brown-Olds/Howard to issue special nontaxable transaction certificates under Contract 2849, and stated his preference for conducting audits of contractors performing work for the Government in order to resolve issues left unsettled in the *Zia* decision.

11. On July 17, 1975, I attended a meeting with Commissioner O'Cheskey, his attorneys, and Mr. Charles E. Stratton of the U.S. Department of Justice. At the July 17, 1975, meeting Commissioner O'Cheskey and his attorneys reiterated their positions that the concurring opinion of Judge Hernandez in the *Zia* case was incorrect and not binding on the Bureau and that the United States was not a proper party to proceedings before the Commissioner of Revenue in which tax liabilities of its contractors were at issue. Mr. Stratton advised Mr. O'Cheskey of the Government's intent to file the present suit for declaratory relief in the Federal District Court for the District of New Mexico.

12. As of this date the Bureau has not authorized Wallace/Brown-Olds/Howard to issue special nontaxable transaction certificates under Contract 2849, nor authorized the use of permanent nontaxable transaction certificates by any ERDA contractor. The use of permanent nontaxable transaction certificates applicable to sales of tangible personal property to the United States would relieve ERDA and its contractors of the record-keeping requirements of Contract 2849.

/s/ John F. McNett
JOHN F. MCNETT

SUBSCRIBED AND SWORN TO before me this 16th day of January, 1976.

/s/ Elizabeth R. Gallegos
Notary Public

My commission expires February 27, 1977.

SUPREME COURT OF THE UNITED STATES

No. 80-702

UNITED STATES, PETITIONER

v.

NEW MEXICO, ET AL.

ORDER ALLOWING CERTIORARI

Filed February 23, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

Justice Stewart took no part in the consideration or decision of this petition.

U. S. GOVERNMENT PRINTING OFFICE: 1981 351789 879